

# NOMINATIONS OF SUSAN TSUI GRUNDMANN AND ANNE MARIE WAGNER

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## HEARING

BEFORE THE

### COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

OF THE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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NOMINATIONS OF SUSAN TSUI GRUNDMANN TO BE A MEMBER AND  
CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD, AND ANNE MARIE  
WAGNER TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD

OCTOBER 20, 2009

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## **NOMINATIONS OF SUSAN TSUI GRUNDMANN AND ANNE MARIE WAGNER**

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**TUESDAY, OCTOBER 20, 2009**

U.S. SENATE,  
COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:30 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Daniel K. Akaka presiding.

Present: Senators Akaka and Voinovich.

### **OPENING STATEMENT OF SENATOR AKAKA**

Senator AKAKA. This hearing will come to order. Good afternoon, everyone. This seems to be like a family affair today, and I am glad to note that.

Today the Committee on Homeland Security and Governmental Affairs meets to consider the nominations of Susan Tsui Grundmann—and her family is here—to be Chairman of the Merit Systems Protection Board, and Anne Wagner to be Vice Chairman, and your lovely family is here, too. I would like to extend a warm welcome to both of these well-qualified nominees.

Ms. Grundmann has been an advocate for Federal workers for 20 years. Since 2002, Ms. Grundmann has served as General Counsel to the National Federation of Federal Employees, a union which represents approximately 100,000 Federal employees throughout the country. Prior to that, she served as General Counsel to the National Association of Air Traffic Controllers. Ms. Grundmann attended the American University and received her law degree from Georgetown University.

Ms. Wagner likewise has strong experience with the Federal workforce. She currently serves as the General Counsel to the Personnel Appeals Board, which decides personnel disputes within the U.S. Government Accountability Office. Prior to that, she served as a member of that Board for 6 years. Before joining GAO, Ms. Wagner worked for 20 years as Assistant General Counsel to the American Federation of Government Employees, the largest Federal employee union, which represents many employees in my home State of Hawaii. Ms. Wagner graduated from the University of Notre Dame and received her law degree from the George Washington University.

I want to congratulate both of you on your nominations to these important positions. I know you both have some family and friends in the audience, and I want to give you the opportunity to intro-

duce them to the Committee. Ms. Grundmann, I have met your husband, Karl, and daughter Milla, who are both with us today. It is great to know that Milla is very studious. She has her note pad here. She is in the third grade and got the day off from school to be with us today. We hope that this hearing is something of a civics lesson for Milla. I also want to welcome your Mom, Min Lan, who is here also today.

Ms. Grundmann, please—well, before we move to the introductions, I want to say that we are so fortunate to have our friend here, Senator Voinovich. He is a very busy man, and he took time away from the Senate floor to be here at this hearing. He was on the floor managing an appropriations bill, so I will ask him for his statement, and then he will have to leave and go back to the floor. So if you want to see him after this, turn on the TV. [Laughter.]

He is on TV on the floor.

Senator VOINOVICH. Watch me just sitting there.

Senator AKAKA. Senator Voinovich.

#### **OPENING STATEMENT OF SENATOR VOINOVICH**

Senator VOINOVICH. Thank you, Senator Akaka. I am pleased to be here, and I want the nominees to know that I have reviewed your qualifications, and you are both very impressive.

With the passage of the Civil Service Reform Act of 1978, Congress established the Merit Systems Protection Board (MSPB) to serve as a guardian of merit principles across the Federal workforce. Both of you are familiar with that. You will be charged with providing a fair and efficient forum for employees, retirees, candidates for Federal employment, and agency management alike when reviewing personnel decisions and agency policy. Properly fulfilling this role is necessary to sustain a top-notch workforce, and I think the reputation of that operation is important.

In light of the coming demographic transition in the Federal workforce, it is vital that agencies are seen as attractive to today's best and brightest. The next generation of Federal employees, many of whom will be joining the workforce directly from undergraduate or graduate study, are accustomed to competitive and intellectually rewarding environments. To be an attractive alternative to the private sector, prospective Federal employees must be assured that in the Federal sector they will succeed or fail according to the quality of their work, not by the arbitrary will of an agency manager or the transient initiatives of Presidential Administrations. Today's best and brightest expect nothing less.

At the same time, though, we must be sure that our concern for protecting individual employees does not grant de facto tenure for Federal workers. Front-line managers need the training, tools, flexibility, and leadership support to discipline poorly performing employees. When an employee's shortcomings seriously affect the quality of government services provided to the public, the option to terminate employment must be a practical remedy. In today's difficult economic environment, thousands of Americans are losing their jobs despite outstanding performance. We must ensure that Federal employees are held to similar standards. On both counts, the nominees will play a pivotal role, if confirmed.

I was going to look forward to hearing from both of you about your plans for leading this important agency, but I must return to the floor. But, I am interested in how you intend to respond to the demographic, statutory, and administrative changes that are expected to increase the Board's caseload. You are going to have a lot more things to do. I am also curious to learn what tools the nominees feel would help reduce the time required to adjudicate appeals and improve the quality of decisions issued by the MSPB. Finally, I am interested in hearing about the plans to help inform Federal workforce policy through the Board's "special studies" function. I think it is really important that people understand the tools and opportunities available to them and how the civil service system operates.

So I commend you for willingness to step forward and to serve your country, and I want to thank the members of your family that are here today for the sacrifice that they have made over the years so that you both could get to where you are at and, quite frankly, for the sacrifice that will have to be made so that they can do the job that they have to do. So often we forget the contribution that spouses make to this whole operation, their willingness to have us work long hours. I think about Janet, my wife, she has something called the "Honey Do list." Did you ever hear about the Honey Do list? I have not been as faithful to the Honey Do list as I should be. But that is part of the fact that I am kind of busy with what I am doing here, and I thank God that she is so understanding.

So thank you very much, and, again, I apologize for having to go back to the floor. Thank you.

Senator AKAKA. Thank you very much, Senator Voinovich.

I know his heart is here, but he will have to be on the Senate floor managing the bill. Thank you very much.

Ms. Grundmann, I introduced your family. Are there any others that you want to introduce this morning?

Ms. GRUNDMANN. I do. Thank you very much.

Joining me today is the staff from the National Federation of Federal Employees and friends from the National Air Traffic Controllers Association, along with some colleagues from the United Defense Workers Coalition.

I also want to give special thanks to the staff of the MSPB, particularly the General Counsel's Office, Chad Bungard, and Michael Carney, who is not here today; and my special shepherd through this process, Rosalyn Coates.

Senator AKAKA. Well, welcome all of you.

Now I would like to turn to Ms. Wagner. I met your husband, and I want to welcome Allynn here, and also your children, Katie, Nora, and Carlin. Do you have anyone else you wish to introduce to the Committee?

Ms. WAGNER. Yes, thank you, Senator. I would like to recognize my cousin, Erin Clinard, who made the trek out from Waterford, Virginia, for this hearing.

I would also like to acknowledge my colleagues at the Personnel Appeals Board who are attending the hearing today and other friends from AFGE.

And I would also simply like to reiterate Ms. Grundmann's recognition of the assistance that the MSPB General Counsel's office

has provided me in preparation for this hearing. They have been terrific.

Senator AKAKA. Well, thank you very much, and let me again welcome all of you here and, coming from Hawaii, with much aloha to all of you.

These positions are among the most important to Federal employees. Our dedicated Federal employees are among this country's greatest assets. Civil servants must be able to serve their country without undue influence or fear of discrimination at the workplace.

The MSPB was created to safeguard the merit system principles and to help ensure that Federal employees are free from discrimination and retaliation at the workplace. If confirmed, I expect these nominees to be strong advocates for the merit system and the Federal workforce.

One of the most important responsibilities of the Board is to adjudicate claims brought by Federal employee whistleblowers. For almost a decade, I have worked to reform the process for protecting Federal whistleblowers. As the sponsor of the Whistleblower Protection Enhancement Act of 2009, I believe that one of the key tenets of the Federal merit systems is the ability of Federal employees to report waste, fraud, and abuse without fear of retaliation.

For too long, Federal whistleblowers have not received the protection they need. Since the year 2000, the Board has repeatedly misapplied congressional intent with respect to whistleblower protection. I am hopeful that with new statutory protections—and additional Board members who understand the important role of whistleblower protections—Federal employees will feel confident again that they can report waste, fraud, abuse, or illegal activity without risking their professional and financial futures.

I am very happy to conduct this hearing today. For many years, I should tell you, Senator Voinovich and I have worked together to improve all aspects of the Federal workforce.

The nominees have filed responses to a biographical and financial questionnaire, answered pre-hearing questions submitted by the Committee, and had their financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made a part of the hearing record, with the exception of the financial data. It is on file and available for public inspection at the Committee offices.

Our Committee rules require that all witnesses at nomination hearings give their testimony under oath. Therefore, I ask the nominees to please stand and raise your right hands.

Do you solemnly swear that the testimony you are about to give the Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. GRUNDMANN. I do.

Ms. WAGNER. I do.

Senator AKAKA. Thank you. Let it be noted for the record that the witnesses answered in the affirmative.

Ms. Grundmann, would you please proceed with your statement?



**TESTIMONY OF SUSAN TSUI GRUNDMANN<sup>1</sup> TO BE A MEMBER  
AND CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD**

Ms. GRUNDMANN. Thank you. Good afternoon, Chairman Akaka. I want to thank you for this opportunity to appear before you today as you consider my nomination to be a Member and the Chairman of the U.S. Merit Systems Protection Board. I am honored by the confidence that President Obama has placed in me by nominating me to this important position of public trust. I pledge that, if confirmed, I will discharge my responsibilities with integrity and in accordance with law, rule, and regulation. I also want to thank you for your consistent efforts to ensure that the American public is well served by a civil service system that operates effectively and efficiently.

Mr. Chairman, for most of my practice, I have served as an advocate for Federal employees. During that time, I have also worked with Federal managers at all levels. I have worked in the private sector and with State courts. I have represented the interests of both management and line employees. I have become intimately familiar with the myriad of issues that give rise to workplace disputes. My cumulative experience has provided me with a well-grounded perspective of how the merit systems process works to ensure fairness in the Federal workplace.

To serve as a Member and Chairman of the Merit Systems Protection Board is the opportunity to once again return to the practice of law in a neutral capacity. At the beginning of my legal career, I clerked for the judges of the Nineteenth Judicial Circuit of Virginia, an experience that laid the foundation for my commitment to public service.

As Congress explores avenues for improving certain aspects of the civil service system, the Board's role as an independent and a neutral arbiter of fairness and adherence to merit principles remains vital to the effective and efficient operations of the Federal Government. In fiscal year 2009, the average case processing time for the initial decision was 83 days. The average case processing time on petitions for review to the full Board was 94 days. These statistics provide a solid basis for confidence in the MSPB appeals process. If confirmed, I will work to build upon the Board's impressive record for timely and balanced adjudication of challenges to adverse personnel actions and other matters under its jurisdiction.

It is crucial that both employees and managers perceive that they have equal access to the process and that the process provides them with a fair opportunity to present their respective positions. I am committed to ensure transparency of the process through a focus on issuing clear, understandable decisions that provide workable guidelines for the parties and the Board's stakeholders. This objective is particularly important in a venue such as the MSPB where a large percentage of the appeals are filed by *pro se* appellants. If confirmed, I commit to these fundamental principles from the outset.

The Board's statutory studies function is also a significant part of the agency's responsibility. Study reports issued by the MSPB are highly regarded by the Federal human resources management

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<sup>1</sup> The prepared statement of Ms. Grundmann appears in the Appendix on page 16.

community and other stakeholders of the Board. If confirmed, I plan to work with my fellow Board members as well as the Office of Policy and Evaluation to continue this record of excellence. And, in particular, I pledge to you to report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

Thank you for allowing me to give my statement, and I look forward to any questions you have to offer.

Senator AKAKA. Thank you very much, Ms. Grundmann, and thank you for your commitment. We certainly look forward to working with you.

Ms. Wagner, will you please proceed with your statement?

**TESTIMONY OF ANNE MARIE WAGNER<sup>1</sup> TO BE A MEMBER,  
MERIT SYSTEMS PROTECTION BOARD**

Ms. WAGNER. Good afternoon, Chairman Akaka. I, too, would like to thank you for this opportunity to appear before you today. I would also like to express my appreciation to my family, friends, and colleagues for their support and encouragement throughout this process.

I was and continue to be honored by President Obama's nomination of me to serve as a member of the Merit Systems Protection Board, and it is a privilege to appear before you today seeking Senate confirmation of my nomination. I wholeheartedly support the MSPB's statutory mission to protect Federal merit systems and the rights of individuals within those systems; and, if confirmed, I will commit myself fully to carrying out that mission.

In 1978, when Congress enacted the Civil Service Reform Act, it did so to establish a comprehensive system governing Federal employment. It created the MSPB to have a central role as the impartial adjudicator of claims arising from personnel actions. In carrying out that duty, the Board must examine personnel actions to determine if they are consistent with law and merit principles and to provide meaningful redress when violations occur.

In my 20 years of practicing Federal employment law, I have been particularly mindful of the continued importance that the MSPB plays today to the communities that it serves as well as to the American public. Much has changed in the 30 years since the MSPB's inception, but the need to ensure that the Federal workplace operates fairly and effectively has not. Congress entrusted the MSPB with that job, and I am both humbled and excited at the prospect of playing a part in carrying out the Board's mission.

If confirmed, I look forward to working closely with Susan Grundmann, whose nomination as Chairman of MSPB I fully support, and Board Member Mary Rose, to meet the challenges facing the MSPB now and in the future.

I thank you again for this opportunity to appear before you and would be happy to answer whatever questions you have. Thank you.

Senator AKAKA. Thank you very much, Ms. Wagner.

I will begin with the standard questions this Committee asks of all nominees. First, is there anything you are aware of in your

<sup>1</sup> The prepared statement of Ms. Wagner appears in the Appendix on page 52.

background that might present a conflict of interest with the duties of the office to which you have been nominated?

Ms. GRUNDMANN. I realize that the Board members must not only uphold but promote independence, integrity, and impartiality, and in preparation for the confirmations process, I have consulted with the Office of Government Ethics (OGE) and the designated ethics official at MSPB. No conflicts were found. Any future conflicts will be resolved consistent with the agreement that I have signed with the MSPB.

Senator AKAKA. Thank you.

Ms. WAGNER. Mr. Chairman, there are no conflicts in my background that would prevent me from carrying out the duties of a member of the MSPB.

Senator AKAKA. Thank you. Second, do you know of anything, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Ms. GRUNDMANN. I intend to fully discharge my responsibilities with integrity and in accordance with the law.

Senator AKAKA. Thank you, Ms. Grundmann. Ms. Wagner.

Ms. WAGNER. Mr. Chairman, there is nothing in my background that would impede my ability to carry out my duties as a member with integrity and effectiveness.

Senator AKAKA. Thank you. Third, do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Ms. GRUNDMANN. I agree without reservation.

Ms. WAGNER. I agree.

Senator AKAKA. Well, thank you very much for your responses, and I will begin with the questions.

As the sponsor of S. 372, the Whistleblower Protection Enhancement Act of 2009, I believe that Federal employees provide a valuable service to our country when they expose waste, fraud, and abuse in the government. What is your view of the role whistleblowers play in strengthening the merit system and improving the effectiveness of the Federal Government?

Ms. Grundmann, we will begin with you.

Ms. GRUNDMANN. Thank you, Mr. Chairman.

The role that Federal employees play is absolutely vital in the sense of exposing fraud, waste, abuse, dangers to health and safety, from a position that is closest to the source. They are in essence the guardians of good government. They lead and they in turn should be provided protection against reprisal for such disclosures. I wholly support that principle.

Senator AKAKA. Thank you. Ms. Wagner.

Ms. WAGNER. Mr. Chairman, I believe that whistleblowers perform an essential function to ensure the accountability of the Federal Government to the citizens of this country, and as Ms. Grundmann has stated, I agree wholeheartedly with the idea that whistleblowers must be protected from retaliation for exposing waste, fraud, and abuse.

Senator AKAKA. Thank you. Ms. Wagner, in your answers to the Committee's pre-hearing questions, you state that you expect a rise

in the number of claims filed with the Board under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunity Act. As the Chairman of the Senate Veterans' Affairs Committee, I am strongly committed to promoting the employment of veterans. What will you do to familiarize yourself with these laws and ensure that veterans' rights are protected in the Federal workforce?

Ms. WAGNER. Mr. Chairman, I have a long history in my career of dealing with claims that arise within various statutory contexts, both complex statutory systems and otherwise. I am quite familiar with the approaches to statutory construction that are required when you are dealing with statutory claims such as claims arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunity Act (VEOA). I would do everything that is necessary to come to a full understanding of the elements of causes of action and claims that arise under each of those statutes. I would engage in extensive research and analysis with regard to those claims.

In answering that question, I was anticipating that because of the current increase in military deployments, there was a potential for an increase in such claims. I cannot predict for certain that it is what will occur, but if it does occur, I believe that the MSPB will be ready to handle any increased workload, according veterans the full rights that they are provided under each of those statutes.

Senator AKAKA. As you know, in 2002 the Department of Homeland Security (DHS) was given the authority to establish a new human resources system. A new appeals system was supposed to address concerns over timeliness, but DHS regulations implementing the process were controversial and raised concerns from both employee groups and Members of Congress regarding fairness.

Last year, MSPB issued regulations to implement the system, but later rescinded them in light of Congress' decision to deny funding for their implementation.

What are your thoughts regarding the timeliness of adjudications before the MSPB and the regulations issued for the DHS appeals system?

Ms. GRUNDMANN. Thank you, Mr. Chairman. My understanding with respect to the timeliness of decisions, as I indicated in my opening statement, is that not only initial decisions but petitions for review are moving at a very rapid pace. The regulations that DHS proposed, along with MSPB's subsequent follow-up, expedited the system—not to the point that it is unmanageable, but certainly those time frames can be met.

In the event that the DHS regulations are implemented, the Board will be ready, the administrative judges will be ready to process those cases in the fashion as designated by statute and regulation.

Senator AKAKA. Thank you. Ms. Wagner.

Ms. WAGNER. Mr. Chairman, I believe that the Board has over the last couple of years demonstrated an increased efficiency with regard to decisionmaking, both at the regional level as well as at the Board level, and I would hope, if confirmed, we would continue on that road of improving the efficiency of the decisionmaking process at both the evidentiary phase as well as the appellate process.

With the current status of the DHS personnel systems and DOD personnel systems certainly—not so much in flux, but in light of recent statutory enactment—it does not appear that the regulations that the MSPB has issued concerning those systems would necessarily be implemented in any context. However, I believe that the Board will continue to look at ways to improve its processes for all Federal employees across the board.

Senator AKAKA. Ms. Grundmann, I was pleased that in your answers to the Committee's pre-hearing questions, you stated that, if confirmed, you will focus on recruiting a new generation of employees to work at the Board. Recent college graduates and young professionals may not be aware of the Board as a potential employer. Would you please elaborate on your plans to improve your recruitment?

Ms. GRUNDMANN. Absolutely. When I began my career, Federal service, public service, was something that I aspired to, we all aspired to. Agencies periodically recruited at law schools, not only to educate future lawyers on their respective missions, but to offer them another means of using their legal talent.

I see no reason why that same recruitment effort cannot begin again, beginning within law schools and certainly in colleges. It is the unique opportunity to make an impact in a neutral capacity and to protect the Federal merit principles in government.

Senator AKAKA. As you know, one of the Board's responsibilities is to conduct studies relating to the civil service and report to the President and the Congress. What issues should the Board focus on in future studies? Ms. Grundmann.

Ms. GRUNDMANN. Thank you, Mr. Chairman. As I indicate in my policy answers, I understand that OPM is embarking on a draft strategic plan. If confirmed, I would look for a definite Board role with my fellow Board members to be part of this new strategic plan for the Federal workforce.

In addition, we know that there are currently four generations in the Federal workforce. The impact of technology is tremendous on all four generations. If confirmed, I would look to study the impact of that technology, the accelerated implementation of that technology, as well as what happens to employees who cannot adapt to that technology.

And, finally, as I mentioned in my opening statement, there is a need and a statutory responsibility to report to the President and the Congress with regard to whether prohibited personnel actions are being used and the public interest is being served by protecting employees from prohibited personnel actions.

Senator AKAKA. Thank you. Ms. Wagner.

Ms. WAGNER. Thank you, Mr. Chairman. The MSPB, of course, has a division that is devoted to this aspect of the Board's mission, and I am sure that they have a system of identifying issues that are of importance to the various communities within the Federal workforce.

That said, I believe that there are a number of issues that I would be interested in seeing examined. One would be something that you alluded to, which is this ongoing need to develop new recruitment and retention initiatives, especially in light of the chang-

ing approach to the workforce that studies have demonstrated that newer employees bring to the work experience.

I would look also at the impact of Federal retirement on institutional knowledge within agencies and the impact that the increase in Federal retirement will have on the Federal workforce and the mission of the agencies.

And, finally, I would potentially look at the linkage between performance appraisal systems and pay-for-performance systems to see the extent to which changes in performance appraisal systems are needed in order to engender trust in any potential pay-for-performance system that the Federal Government would undertake.

Senator AKAKA. Ms. Grundmann, as you know, the chairman of MSPB serves as the chief executive and administrative officer of the Board. What is your understanding of this role? And how do you feel that your experiences as General Counsel of the National Federation of Federal Employees will help you fulfill that role?

Ms. GRUNDMANN. Thank you, Mr. Chairman. It is a good question.

The statute mandates that the chairman of MSPB serve not only as the CEO but the administrative officer on behalf of the agency and tasks the chairman with certain statutory responsibilities, such as supervising staff, distributing work, appointing people, and vesting within the chairman the sole ability to initiate litigation.

In my experience at both NFFE and NATCA, I served on the management team. People often forget that although unions represent Federal employees, they are themselves employers. And in that role, I had the unique experience of representing management of the employees of the union, and I hope that experience, if confirmed, will enhance my ability to lead the MSPB.

Senator AKAKA. Ms. Wagner, I would like to hear from you as well. What is your understanding of your role as Vice Chairman? And how do you believe your experience as a member of the GAO Personnel Appeals Board will assist you in serving as Vice Chairman?

Ms. WAGNER. Mr. Chairman, I believe that the role of vice chairman is one that is set out under the statute, and very clearly so, and the role is to assume the duties of the chairman in the absence of the chairman. Those additional duties that the chairman has under the statute, as Ms. Grundmann has alluded to, involve the administrative and executive functions of the agency, so that if there is ever a situation where Ms. Grundmann is not in a situation to be able to carry out her duties as chairman, the vice chairman would be, under law, obligated to step up to do that.

Should that occur, I believe that my experience as a General Counsel in the Personnel Appeals Board will stand me in good stead in that there is a lot of management of resources, assessment of allocation of resources that is involved in carrying out my duties as General Counsel. And I believe that it is a sensitivity to those types of issues that would be particularly helpful in carrying out the executive functions at the MSPB, should that occur.

Senator AKAKA. Ms. Grundmann, as the sponsor of S. 674, the Federal Supervisor Training Act of 2009, I believe investing in better training for supervisors could help prevent many workplace disputes. I was pleased to see in your answers to the Committee's pre-

hearing questions that you support training supervisors on the importance of following agency procedures when taking personnel actions against employees.

How can the Board promote improved training for Federal managers on merit systems principles and the Board's appeals process?

Ms. GRUNDMANN. The MSPB is a vast storehouse of experiences on good management and bad management, good employees as well as bad employees. In my experience, I have seen that sometimes personnel actions will be taken for the right reasons, but agency procedures, collective bargaining agreement procedures, may have been violated, which in turn compels the employee and/or his or her advocate to react. In training supervisors on following the procedures and taking personnel actions for the proper reasons, I believe that is a good step toward the understanding of management.

I understand your question to be one of outreach by the Board to managers, perhaps even lessons learned. Everybody loves top-ten lists. I do not see any reason why we cannot develop a list of experiences that are commonly seen as common mistakes for why personnel actions are overturned.

Senator AKAKA. Thank you. This will be my final question, and it is addressed to both of you on the panel. We have discussed the many important issues the Board faces. If confirmed, what will be your long-term priorities while a Board member? Ms. Grundmann.

Ms. GRUNDMANN. Thank you, Mr. Chairman. Like many of the Federal agencies, the Board faces the same issues: Recruiting and retaining highly trained and qualified employees to carry on the Board's mission into the next generation. We have already talked about a number of ways to conduct outreach to the next generation, to enhance the Board's effectiveness and to bring new ideas to light.

These challenges, I think, are in terms of outreach and education. If confirmed, I would like to take an active role with my fellow Board members and determine what is the next step, where is the next phase, what is the next chapter for the MSPB.

Senator AKAKA. Ms. Wagner.

Ms. WAGNER. My long-term priority, if confirmed as a member of the MSPB, would be to engender trust in the MSPB by all the stakeholders—employees and managers alike—in carrying out the adjudicating function of the agency, that they can trust that this process will be fair and an effective one. And along with the other managerial long-term priorities that Ms. Grundmann has already alluded to, I believe that this would be my top priority.

Senator AKAKA. I want to thank both of you for your responses. This will be helpful to the Committee for what we are trying to do to help the Federal employees of our country.

At this time there are no further questions for Ms. Grundmann or Ms. Wagner. There may be, however, additional questions for the record, which will be submitted to you in writing from Members who are not present.

The hearing record will remain open until the close of business tomorrow for Members of this Committee to submit additional statements or questions.

Again, I want to say thank you very much to Ms. Grundmann and Ms. Wagner, your families, and your supporters who are here,

too, and others for attending. I am pleased to be able to hold a hearing for such well-qualified nominees. It is my hope that the Committee will vote soon on your nominations and that your nominations will be considered by the full Senate very shortly.

Thank you very much. This hearing is adjourned.

[Whereupon, at 3:15 p.m., the Committee was adjourned.]



# APPENDIX

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## STATEMENT OF SENATOR DANIEL K. AKAKA

*Susan Tsui Grundmann to be Chairman and Anne Marie Wagner to be Member,  
Merit Systems Protection Board*

### **Nomination Hearing Senate Committee on Homeland Security and Governmental Affairs**

Today the Committee on Homeland Security and Governmental Affairs meets to consider the nominations of Susan Tsui Grundmann to be Chairman of the Merit Systems Protection Board (MSPB), and Anne Marie Wagner to be Vice Chairman.

Ms. Grundmann has been an advocate for Federal workers for the past 20 years. Since 2002, Ms. Grundmann has served as General Counsel to the National Federation of Federal Employees, a union which represents approximately 100,000 Federal employees throughout the country. Prior to that, she served as General Counsel to the National Association of Air Traffic Controllers. Ms. Grundmann attended the American University and received her law degree from Georgetown University.

Ms. Wagner likewise has strong experience with the Federal workforce. She currently serves as the General Counsel to the Personnel Appeals Board, which decides personnel disputes within the U.S. Government Accountability Office (GAO). Prior to that, she served as a member of that Board for six years. Before joining GAO, Ms. Wagner worked for 20 years as Assistant General Counsel to the American Federation of Government Employees, the largest Federal employee union, which represents many employees in my home state of Hawai'i. Ms. Wagner graduated from the University of Notre Dame and received her law degree from the George Washington University.

Our dedicated Federal employees are among this country's greatest assets. Civil servants must be able to serve their country without undue influence or fear of discrimination at the workplace. The MSPB was created to safeguard the merit system principles and to help ensure that Federal employees are free from discrimination and retaliation at the workplace. If confirmed, I expect these nominees to be strong advocates for the merit system and the Federal workforce.

One of the most important responsibilities of the Board is to adjudicate claims brought by Federal employee whistleblowers. For almost a decade, I have worked to reform the process for protecting Federal whistleblowers. As the sponsor of the Whistleblower Protection Enhancement Act of 2009 (S.372), I believe that one of the key tenets of the Federal merit systems is the ability of Federal employees to report waste, fraud, and abuse without fear of retaliation.

For too long, Federal whistleblowers have not received the protection they need. Since the year 2000, the Board has repeatedly misapplied Congressional intent with respect to whistleblower protection. I am hopeful that with new statutory protections – and additional Board members who understand the important role of whistleblower protections – Federal employees will feel confident again that they can report waste, fraud, abuse, or illegal activity, without risking their professional and financial futures.

**OPENING STATEMENT OF SENATOR GEORGE V. VOINOVICH  
NOMINATIONS OF SUSAN GRUNDMANN TO BE CHAIRMAN, MERIT SYSTEMS PROTECTION  
BOARD AND ANNE WAGNER, TO BE VICE CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD**

**NOMINATION HEARING**

**OCTOBER 20, 2009**

Good afternoon, and thank you, Chairman Akaka. I am pleased to be here today to review the qualifications of two individuals nominated by the President to fill important positions at the Merit Systems Protection Board, or the MSPB: Susan Grundmann and Anne Wagner, who have been selected to serve as Chairman and Vice Chairman of the MSPB, respectively.

With the passage of the Civil Service Reform Act of 1978, Congress established the MSPB to serve as a guardian of merit principles across the federal workforce. If confirmed, the nominees will be charged with providing a fair and efficient forum for employees, retirees, candidates for federal employment, and agency management alike when reviewing personnel decisions and agency policy. Properly fulfilling this role is necessary to sustain a top-notch workforce.

In light of the coming demographic transition in the federal workforce, it is vital that agencies are seen as attractive to today's best and brightest. The next generation of federal employees, many of who will be joining the workforce directly from undergraduate or graduate study, are accustomed to competitive and intellectually rewarding environments. To be an attractive alternative to the private sector, prospective federal employees must be assured that in the federal sector they will succeed or fail according to the quality of their work, not by the

arbitrary will of an agency manager or the transient initiatives of Presidential administrations. Today's best and brightest expect nothing less.

At the same time though, we must be sure that our concern for protecting individual employees does not grant *de facto* tenure for federal workers. Front-line managers need the training, tools, flexibility, and leadership support to discipline poorly performing employees. When an employee's shortcomings seriously affect the quality of government services provided to the public, the option to terminate employment must be a practical remedy. In today's difficult economic environment, thousands of Americans are losing their jobs despite outstanding performance. We must ensure that federal employees are held to similar standards.

On both counts, the nominees will play a pivotal role, if confirmed.

I look forward to hearing from Ms. Grundmann and Ms. Wagner about their plans for leading this important agency. Specifically, I am interested to hear how the nominees intend to respond to the demographic, statutory, and administrative changes that are expected to increase the Board's caseload. I am also curious to learn what tools the nominees feel would help reduce the time required to adjudicate appeals and improve the quality of decisions issued by the MSPB. Finally, I am interested to hear about the nominees' plans to help inform federal workforce policy through the Board's "special studies" function.

Ms. Grundmann and Ms. Wagner, I commend you for willingness to answer the President's call to service, and I look forward to your testimony.

Thank you, Mr. Chairman.

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Hearing on the Confirmation  
On the Nomination of**

**Susan Tsui Grundmann  
to be a Member and Chairman  
of the U. S. Merit Systems Protection Board**

**Statement for the Record  
October 20, 2009**

Good afternoon Chairman Akaka, Ranking Member Voinovich, and members of the Committee. Thank you for this opportunity to appear before you today as you consider confirmation of my nomination to be a Member and the Chairman of the U. S. Merit Systems Protection Board. I am honored by the confidence that President Obama has placed in me by nominating me to this important position of public trust. I pledge that, if confirmed, I will discharge my responsibilities with integrity and in accordance with law, rule and regulation. I also want to thank you for your consistent efforts to ensure that the American public is well served by a civil service system that operates effectively and efficiently.

Mr. Chairman, for most of my practice, I have served as an advocate for Federal employees. During that time, I have also worked with Federal managers at all levels. I have worked in private practice and with the state courts. I have represented the interests of both management and line employees. I have become intimately familiar with the myriad of issues that give rise to workplace disputes. My cumulative experience has provided me with a well grounded perspective of how the merit systems process works to ensure fairness in the Federal workplace. To serve as a Member and Chairman of the Merit Systems Protection Board is the opportunity to once again practice law in a neutral capacity. At the beginning of my legal career, I clerked for the judges of the Nineteenth Judicial Circuit of Virginia and welcome this opportunity to return that experience that laid the foundation for my commitment to public service as a neutral.

As Congress explores avenues for improving certain aspects of the civil service system, the Board's role as an independent and neutral arbiter of fairness and adherence to merit principles by Executive branch agencies remains vital to the effective and efficient operation of the Federal government. In FY 2009, the average case processing time for the initial decision was 83 days. The average case processing time on petitions for review to the full Board was 94 days. These statistics provide a solid basis for confidence in the MSPB appeals process. If confirmed, I will work to build upon the Board's impressive record for timely and balanced adjudication of challenges to adverse personnel actions and other matters under its jurisdiction.

It is crucial that both employees and managers perceive that they have equal access to the process, and that the system provides them with a fair opportunity to present their respective positions. I am committed to ensure transparency of the process through a focus on issuing clear, understandable decisions, that provide "workable" guidelines for the parties and the Board's

stakeholders. This objective is particularly important in a venue such as the MSPB where a large percentage of the appeals are filed by pro se appellants. If confirmed, I commit to these fundamental principles from the outset.

The Board's statutory studies function is also a significant part of the agency's responsibility. Study reports issued by the Merit Systems Protection Board are highly regarded in the Federal human resources management community and by the stakeholders of the Board. If confirmed, I plan to work with my fellow board members as well as the Office of Policy and Evaluation to continue this record of excellence. In particular, I pledge to report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is adequately protected.

Mr. Chairman, at this time, I would be pleased to answer any questions that you or other members of the panel would like to ask of me.

**BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES**

**A. BIOGRAPHICAL INFORMATION**

1. **Name:** (Include any former names used.)  
  
Susan Tsui Grundmann  
Susan Tsui (maiden name)
2. **Position to which nominated:** Chairman, Merit Systems Protection Board
3. **Date of nomination:** July 31, 2009
4. **Address:** (List current place of residence and office addresses.)  
  
Home: REDACTED  
  
Work: 805 15<sup>th</sup> Street, NW  
Suite 500  
Washington, DC 20005
5. **Date and place of birth:**  
  
02/24/1962  
Chicago, IL
6. **Marital status:** (Include maiden name of wife or husband's name.)  
  
Married to Karl Grundmann.
7. **Names and ages of children:**  
  
REDACTED
8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.  
  
Georgetown University Law Center, J.D. May, 1986.  
Dates of attendance: 08/83 through 05/86.  
  
American University, B.A., May 1983, *cum laude*.  
Dates of attendance: 01/80 through 05/83.

Randolph Macon College

Dates of attendance: 08/79 through 01/80.

9. **Employment record:** List all jobs held since college, and any relevant or significant jobs held prior to that time, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)

2002 to Present: General Counsel, National Federation of Federal Employees, Washington, DC.

1990 to 2002: National Association of Air Traffic Controllers, Washington, D.C.  
General Counsel (09/00 to 10/02);  
Executive Counsel (05/92 to 09/00);  
Staff Counsel (12/90 to 05/92).

1988 to 1990: Senior Staff Counsel, Sheet Metal Workers National Benefit Funds, Alexandria, VA.

1987 to 1988: Associate, Sedam and Shearer, Fairfax, VA.

1986 to 1987: Law Clerk, Nineteenth Judicial Circuit of Virginia, Fairfax, VA.

1985: Research Assistant, Georgetown University Law Center, Washington, DC.

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

None.

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

2002 – Present: General Counsel, National Federation of Federal Employees, Washington, D.C.

2003-Present: Co-Trustee, Tim T. Tsui Family Trust, Manassas, VA. No compensation

1990-2002: General Counsel, Executive Counsel, Staff Counsel, National Association of Air Traffic Controllers, Washington, D.C.

1988-1990: Senior Staff Counsel, Sheet Metal Workers National Pension Fund, Alexandria, VA.

12. **Memberships:** List all memberships, affiliations, or and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable or other organizations.

Current Memberships

Virginia State Bar (1986 to present)

District of Columbia Bar (1993 to present)

American Bar Association (intermittent, 1989 to present)

NFFE Local 2 (2002 to present)

Lawyers Coordinating Committee (AFL-CIO) (intermittent, 1992 to present)

Previous Memberships

Fairfax Bar Association (1986 to approximately 1994)

Alexandria Bar Association (1988 to approximately 1992)

13. **Political affiliations and activities:**

- (a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None.

- (b) List all memberships and offices held in and services rendered to any political party or election committee during the last 10 years.

None.

- (c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more during the past 5 years.

2008 presidential election-Obama campaign (\$300).

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

Department Honors, American University, 1983.

Department Excellence, American University, 1983.

Phi Kappa Phi Honor Society, 1983.

15. **Published writings:** Provide the Committee with two copies of any books, articles, reports, or other published materials which you have written.



Copies of the following articles are provided:

*From the Desk of the General Counsel*, The Federal Employee, Fall 2009, Summer 2009, Winter 2008, Fall 2008, Spring 2008, Fall 2007, Summer 2007, Fall 2006, Summer 2006, Fall 2005, Summer 2005, Fall 2004, Summer 2004, and February 2004.

16. **Speeches:**

- (a) Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. Provide copies of any testimony to Congress, or to any other legislative or administrative body.

*Convention Speech to the Delegates of the 48th NFFE Convention*, October, 7, 2008.

*Employee Appeals, Review and Resolution*, 'Meet and Confer' with the Department of Defense and the Office of Personnel Management, August 26, 2004.

*Convention Speech to the Delegates of the 47th NFFE Convention*, October 9, 2004.

- (b) Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it.

*Union Priorities in the New Administration*, Federal Service Labor/Management Section, American Bar Association, April 2009 (no written text).

*Union Perspectives*, Interagency Labor Relations Forum, October 2008 and October 2007 (no written text; power point presentation provided).

*NSPS Update*, Federal Service Labor/Management Section, American Bar Association, April 2008 (no written text; power point presentation provided).

*Emerging Issues of Importance to NFFE*, Interagency Labor Relations Forum, February 2008 (no written text).

*NSPS Legal Update*, Federal Service Labor/Management Section, American Bar Association, April 2007 (no written text).

*NFFE Perspective*, Office of Personnel Management, Annual Chief Human Capital Officers Council, May 2007 (no written text).

*What Unions Want Managers to Know About Dealing with Unions*, Federal Personnel Management Institute, Inc., June 2005 (no written text; power point presentation provided).

*Scope of Bargaining*, 'Meet and Confer' with the Department of Defense and the Office of Personnel Management, August 25, 2004.

17. **Selection:**

- (a) Do you know why you were chosen for this nomination by the President?

I believe I was selected based on my background and experience in representing employees in the federal sector. For additional information, please see my response to question 17(b) below.

- (b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

For the last 19 years, I have been a practicing attorney specializing in federal labor law. As an advocate directly, or in collaboration with field advocates/attorneys, I have addressed the issues and problems federal employees face on a daily basis and through personnel actions by agencies. Through this experience, I have gained a unique prospective on how the merit systems process works.

Since 2000, I have served as general counsel to two separate federal labor unions, the National Federation of Federal Employees and the National Air Traffic Controllers Association. In this capacity, I have been part of the management team for these organizations. As such, I have had the opportunity to address, from the employer's standpoint, the personnel issues of employees.

Finally, in conjunction with the William W. Winpisinger Center in Placid Harbor, Maryland, I have had the privilege of training union advocates in the practice and the procedure of the MSPB. Through our training sessions, I have met some of the fine administrative judges that work at the MSPB. From our discussions, I have gained insight into the agency's process and perspective.

**B. EMPLOYMENT RELATIONSHIPS**

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

Yes.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

No.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization, or to start employment with any other entity?

No.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

No.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Yes.

6. Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis? If so, please explain.

No.

#### C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nominations process, I have consulted with the Office of Government Ethics and the designated agency ethics officer for the MSPB, in an effort to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the MSPB's designated agency ethics official, which has been provided to the Committee. I am not aware of any other potential conflicts of interest.

2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any

legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

None.

3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?

Yes.

#### **D. LEGAL MATTERS**

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No.

2. Have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.

No.

3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

In 1984-1985, I was a defendant in a lawsuit in Fairfax Circuit Court arising from a car accident in 1983. The matter was handled by my insurance company, which settled the case.

4. For responses to question 3, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

Please see my response to Question 3, above.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

None.

**E. FINANCIAL DATA**

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

**AFFIDAVIT**

Susan Tsui Grundmann being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

[Signature]

Subscribed and sworn before me this 24th day of August, 20 09

[Signature]  
Notary Public

ERIC FIALA  
Notary Public, District of Columbia  
My Comm. Expires May 14, 2014



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

August 5, 2009

The Honorable Joseph I. Lieberman  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Susan T. Grundmann, who has been nominated by President Obama for the position of Member and Chairman, Merit Systems Protection Board.

We have reviewed the report and have also obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

A handwritten signature in dark ink, appearing to read "Don W. Fox", is written over a light blue horizontal line.

Don W. Fox  
General Counsel

Enclosures - REDACTED

**U.S. Senate Committee on Governmental Affairs  
Pre-hearing Questionnaire for the  
Nomination of Susan Tsui Grundmann to be  
Chairman of the Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Why do you believe the President nominated you to serve as Chairman of the Merit Systems Protection Board ("MSPB" or "the Board")?

Answer:

I believe that the President nominated me to serve as Chairman of the Merit Systems Protection Board because of my background, prior experience, and leadership in federal sector labor and employment law.

2. Were any conditions, expressed or implied, attached to your nomination as Chairman? If so, please explain.

Answer:

None.

3. What specific background and experience affirmatively qualifies you to be Chairman of the MSPB?

Answer:

After beginning my legal career as a neutral, serving as a law clerk to the Judges of the 19<sup>th</sup> Judicial Circuit of Virginia, I have been a practicing attorney specializing in federal labor and employment law for nearly 20 years. As an advocate directly, and in collaboration with field advocates, I have addressed the issues and problems federal employees face on a daily basis and through personnel actions by agencies. During this time, I have had the opportunity to work not only with federal employees in numerous government agencies, but also with federal managers at all levels. Through this experience, I have gained a unique prospective on how the merit systems process works to ensure fairness in the workplace.

I have developed an ability and vision, grounded through experience, which have allowed me to join and lead employee representatives and labor organizations into a cohesive, dynamic structure. I have done this through active listening, detailed analysis, decisive action and by developing policies and strategies in conjunction with other

national labor leaders to lead diverse individuals and constituencies to successful outcomes.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as Chairman of the MSPB? If so, what are they and to whom have the commitments been made?

Answer:

I have made no such commitments.

5. If confirmed as Chairman of the MSPB, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

Answer:

I realize that a Board member must uphold and promote the independence, integrity, and impartiality of the MSPB. I will take the necessary steps to avoid impropriety and the appearance of impropriety. In connection with the nominations process, I have consulted with the Office of Government Ethics and the designated agency ethics officer for the MSPB, in an effort to identify potential conflicts of interest. No potential conflicts were identified following this review. However, any potential conflicts that are identified in the future will be resolved in accordance with the terms of an ethics agreement that I have entered into with the MSPB's designated agency ethics official, which has been provided to the Committee. I am not aware of any other potential conflicts of interest.

## **II. Role and Responsibilities of Chairman of the MSPB**

6. What is your view of the role of Chairman of MSPB?

Answer:

Under the statute, the Chairman is the chief executive and administrative officer of the Board. He or she is tasked to oversee operations and serve as the Board's primary spokesperson. The Chairman is also ultimately responsible for seeing that the agency fulfills its mission, to protect the federal merit systems and the rights of employees within those systems. I also believe that it is incumbent upon the Chairman to work in collaboration with the other Board members to enhance the agency's ability to meet its



obligations and responsibilities, both under the statute and in development of policy, that protect the merit systems principles.

7. The Chairman of the MSPB has the statutory responsibility of serving as "the chief executive and administrative officer of the Board."<sup>1</sup> With respect to the management and administration of the MSPB, what are your views of the respective rights and responsibilities of the Chairman and the other Board members?

Answer:

As the question points out, the Chairman is the Board's "chief executive and administrative officer." This role includes supervising the staff and distributing work among the agency's personnel and administrative units. In addition, pursuant to the MSPB's enabling statute, the Chairman is solely vested with litigation authority and the authority to appoint personnel to carry out the Board's functions. Although I am fully committed to carrying out my statutory responsibilities, my experience has taught me that collaboration through team effort produces the best results. I believe that open communication fosters an exchange of viewpoints and ideas, which in turn, creates a better outcome.

8. In your view, what are the major internal and external challenges facing MSPB? What, specifically do you plan to do as Chairman to address these challenges?

Answer:

With respect to internal challenges, and consistent with an apparent trend in the Federal workforce, I understand that there have been a number of retirements at the MSPB. The challenge for the Board, as for all agencies, is to recruit and retain highly motivated and trained employees to sustain the agency's mission in the coming years. Throughout the past few years, the MSPB has studied the challenges in recruitment and retention throughout the federal government. These studies include the 2008 reports regarding "In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees from Outside the Federal Government" and "Attracting the Next Generation: A look at Federal-Entry Level New Hires." The MSPB should actively engage in recruiting and retaining the highest quality of staff. If confirmed, as Chairman, I intend to begin a recruiting effort, not only in the labor law community, but through academia, to promote the privileges and rewards of service in the public interest through the MSPB.

With respect to external challenges, I believe that the MSPB will see a steady rise in case filings, which comes as a result of increased federal retirements, returning veterans from wars in Afghanistan and Iraq, and changes in law applying to preference eligibles. I further understand that there are proposed changes in the law with regard to whistle

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<sup>1</sup> 5 U.S.C. § 1203(a)

blower protection pending before both houses of Congress. If enacted, I believe the Board will be called upon to interpret these changes by parties and stakeholders. The greatest challenge, however, is meeting the test of processing an increased case load efficiently, while maintaining consistent quality with respect to the decisions issued by the MSPB.

9. What lessons learned could you bring to service as Chairman of the MSPB based on your experience as general counsel of the National Federation of Federal Employees (NFFE) and of the National Air Traffic Controllers Association (NATCA)?

Answer:

Since 2000, I have served as general counsel to two separate federal labor unions, the National Federation of Federal Employees and the National Air Traffic Controllers Association. In these capacities, I have served the dual role as not only an advocate of federal employees, but the representative of the unions' management with the unions' employees. Through this experience, I understand the importance of ensuring that the rights of employees are balanced with the necessity of employers to manage the workforce. These lessons have taught me the merit of creating efficient and open communications as a means to successful leadership. I believe that it is essential not only to lead by example, but to inspire staff and stakeholders to believe in the mission of the organization and to understand the value of individual contribution to that mission. If confirmed, my goal will be to keep the MSPB staff focused and energized, and to solicit constructive participation from interested parties and stakeholders.

10. What management experience have you obtained, whether as general counsel of NFFE and NATCA or otherwise? How would you describe your general philosophy and style of management, and how do you anticipate you would apply them in your role as chairman of the MSPB?

Answer:

As general counsel to two separate federal labor unions, I have been part of the management team for these organizations, where I have had the opportunity to design and implement policy and process. As I answered in question 9, my philosophy is one of inclusion and participation, both of staff and fellow Board members. I believe in focusing on the MSPB's mission with deliberation, energy, and precision. I further believe in engaging the stakeholders for their input and assessment of the Board's achievements and necessary improvements. At the same time, if confirmed, I will seek the counsel of the staff and leadership of the MSPB, in addition to fellow Board members, to ensure to that the public interest is served and that the mission of the MSPB is fulfilled.

11. How would you, as Chairman, plan to communicate with the MSPB staff on efforts to address relevant issues?

Answer:

I believe in open communications, which in my experience, leads to a free exchange of ideas. Whether in regular one-on-one, meetings, through MSPB staff, or through memoranda or emails, I intend to foster an "open door" approach to the office of the Chairman.

12. What short-term and long-term challenges do you believe the MSPB faces regarding recruitment, retention, and management of the workforce needed to achieve its mission, and how do you intend to meet those challenges as Chairman?

Answer:

Consistent with the trend in the Federal workforce, I understand that there have been a number of retirements at the MSPB. The challenge for the Board is to recruit and retain highly motivated and trained employees to sustain the agency's mission in the coming years. If confirmed, as Chairman, I intend to begin an education and recruiting effort, not only in the labor law community, but through academia, to promote the privileges and rewards of service of the public interest through the MSPB.

### **III. Policy Questions**

#### ***MSPB Case-Management and Procedures***

13. The Board has established performance goals for itself that include the issuance of high-quality decisions (which is measured in terms of cases that are not changed, reversed, or remanded on review), and the issuance of timely decisions. (*See* MSPB, Performance and Accountability Report for Fiscal Year 2008, November 17, 2008). Other performance goals related to the adjudication function include controlling average case processing cost, and achieving high rates of case settlement. What is your opinion of the performance goals established by the Board? Do you believe any adjustments may be desirable, and if so what?

Answer:

Of the performance goals listed (rate of remand/reversal, timeliness, control of average case processing cost, rate of settlement), I support these elements as attributes of the quality of the MSPB's decisions. However, I believe that another significant measure of quality involves the clarity of the decision itself, and the extent to which the parties

understand the decision and are guided by the decision in the future. Poorly written decisions are likely to give rise to more cases on the same issue, in essence seeking to clarify the rule, or find exception to the rule. A goal of the MSPB is provide “workable” rules for the stakeholders. At this point, I am unclear as to how this objective can be measured on an annual basis, and expect that this goal can only be measured over time.

14. In your view, what are some options for timelier decision making? Specifically, what do you believe that you, as Chairman, could and should do to expedite Board review, while maintaining fairness and quality in decision-making?

Answer:

In my experience, some cases are simple and relatively clear to resolve. Others contain complexities, either raising multiple issues with numerous facts or novel aspects of the law. I understand that the current practice at the Board provides that individual Board members review cases sequentially, rather than simultaneously. If confirmed, I would investigate the possibility of simultaneous review. I would further examine the possibility of frequent discussions among the Board members, in conjunction with appropriate staff, under the proper parameters of the Sunshine Act.

15. Timeliness is one measure of performance. Quality of decisions is another measure. How can the competing goals of quality and timeliness be balanced? Do you believe that measuring the numbers of cases not changed, reversed, or remanded on review is the best measure the quality of decisions; should other measures be considered?

Answer:

As I stated in my answer to question 13, timeliness, along with the stated performance goals referred in the question, are valid measures of quality. Intangible measurements include the clarity and conciseness of the decision, as well as the simplicity of its expression. These values not currently measured. Ultimately, the extent to which stakeholders understand the decision and are guided by the decision, should be considered in an assessment of the quality of a decision.

16. Do you believe that a performance management system is desirable for administrative judges and attorneys and should they be aligned to the MSPB's performance goals? What do you consider to be the advantages and disadvantages of such a linkage, and what changes, if any, would you consider as Chairman?

Answer:

I support the alignment of the MSPB's goals with the performance management system for administrative judges and attorneys. The 2008 Performance and

Accountability Report states the relevant strategic goal with respect to adjudication: “To provide fair, high-quality, timely and efficient adjudication of cases filed with the MSPB and to make effective use of alternative methods of dispute resolution in MSPB proceedings.” Aligning performance with MSPB goals allows staff to share the responsibilities and successes when the MSPB achieves its goals, and provides consistency throughout the agency. However, while this strategic goal captures tangible, measureable elements, it should not be the only measure, as it does not take into account contingencies that could impact timely and efficient adjudication, such as changes to the Board’s composition that may result in delays in adjudicating cases, or when the Board members cannot agree on an outcome and may resort to communications through staff or writing lengthy complex arguments. Finally, as previously discussed in my answers to questions 13 and 15, “quality” itself may be characterized as either short-term (rate of reversal, remand, etc.) or long-term (clarity of decision or “workability” of a decision) measures, which, as I understand, are not considered in either the MSPB goals or as part of performance management.

17. The appeals process administered by MSPB has been characterized by some as not always being cumbersome. What is your opinion about the balance MSPB should strive for between making its processes “user friendly” to individual parties and yet appropriate to deal fairly and consistently with the complex issues presented to it? How can that balance be achieved?

Answer:

I am committed to ensuring that the process is accessible to individual parties. The challenge is the delicate balance a quasi-judicial tribunal must strike between offering assistance to the parties and maintaining its impartiality. It is crucial that both employees and managers perceive that they have equal access to the process, and that the system provides them with a fair opportunity to present their respective positions. Through my observations as an advocate, the MSPB has taken great strides towards ensuring such accessibility while maintaining balance, through its FAQs for the parties, ample tools available on its website including e-filing, training for agencies and employee organizations, pamphlets, and videos offered to the public that provide information regarding the MSPB’s jurisdiction and process. The administrative judges issue comprehensive orders advising parties of next steps, their respective responsibilities as well as the legal standards parties are expected to meet at the hearing. Outreach by the administrative judges and staff, is and should continue to be encouraged, whether such outreach takes the form of joint agency/employee training or training of other interested parties. These on-going efforts, I believe, serve to demystify and diminish any fear of using the MSPB’s process.

18. The appeals process can be daunting for appellants, particularly those not represented by an attorney. Do you believe that MSPB assist pro se appellants in exercising their rights

to due process? If so, what assistance should MSPB provide? Are there any other things that you believe MSPB can and should do to reduce the burden on appellants?

Answer:

I believe that part of providing Federal employees with due process in any appeals filed is to ensure that pro se appellants have access to assistance with appeals. As discussed in my answer to question 17, the MSPB has made good progress in this direction, while attempting to strike the balance between the provision of impartial assistance and the provision of legal advice. In my experience, one area of concern *not* currently addressed is the discovery process, which seems to perplex pro se appellants. If confirmed, I would evaluate whether and how such guidance can be provided (e.g., sample discovery forms, a list of topics, items, and interrogatories that the parties might expect from the opposing party.)

19. MSPB surveys show that some managers avoid taking appropriate personnel actions against employees because of what they perceive to be a burdensome appeals process. However, then-Acting Chairman Marshall stated to this Committee in March 2003 that MSPB research "clearly shows that there are reasons for this reluctance other than the Board's appeal process itself. These reasons include insufficient training and knowledge, a belief that higher-level managers will not support taking action, and agency-imposed procedures and documentation."<sup>2</sup> What is your opinion on this matter, and what, if anything, do you believe MSPB can and should do to reduce the burden on managers who take appropriate personnel actions?

Answer:

I am an advocate of training for managers and supervisors on the importance of following agency procedures, collective bargaining agreement provisions (if applicable), and MSPB's role in the process. In my experience, I have seen personnel actions taken for sustainable reasons, but process omitted or violated, which in turn compels appellants or their advocates to react. I have also seen personnel actions taken for the wrong reasons, which again, compels the employee or his/her advocate to react. I believe the MSPB should take an active role and reach out to managers, providing effective training on the merit systems principles, prohibited personnel actions, as well as the MSPB process.

20. Some cases require lengthy and complex decisions. What do you believe can be done to help ensure that the Board's decisions are written in such a manner that they can be easily understood and implemented by both agencies and employees?

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<sup>2</sup> S. Hrg. 108-185 (June 4, 2003), at page 55.

Answer:

The clarity and simplicity of a decision assist both agencies and the employees in implementing the Board's decisions. At the outset, decisions should be written with an eye toward readability and offer definitive guidelines as to how the decisions can be executed, as well as what is expected of each party. This, in turn, may be based on whether the parties to any given action have supplied the administrative judge or Board with sufficient evidence to support a certain course of action. When reasonable, I believe it beneficial for the parties to seek clarification of complex decisions. In the event clarification is not sought, the Board rules allow for the parties to seek compliance orders, either of the administrative judges' or Board decisions.

21. One factor that helps reduce average case processing time and conserve agency resources is the settlement of cases. Indeed, the MSPB has established a performance goal for itself that at least 50% of initial appeals that are not dismissed should be settled, and the Board has well exceeded that goal. (See MSPB, Performance and Accountability Report for Fiscal Year 2008, November 17, 2008, at page 17).

- a. What is your view of that goal and of how it can best be achieved and exceeded?

Answer:

Although the MSPB fulfills this goal, the challenge to its continued success requires both parties to come with realistic expectations of the possible outcome or remedy. I believe that if settlement is a viable option, that administrative judge should highlight, without compromising impartiality, the strengths and weakness of each parties' case.

To exceed this settlement rate, I believe in out-reach and education. Agencies, managers, employees, and their advocates, must possess reasonable and pragmatic understanding of what the law allows, as well as the legal limitations. The MSPB's administrative judges and staff possess this perspective, and I encourage this valued experience to be widely shared.

- b. What role, if any, do you believe the MSPB should exercise in to help ensure that parties do not feel undue pressure to enter into settlements that might be unfair, unwise, or without due process?

Answer:

In order to avoid undue pressure to settle a case, the parties must be informed of legal rights and potential liabilities, and the advantages and disadvantages attendant in resolution. Again, the MSPB's role is education and employing the expertise it possesses in mediation and neutral evaluation. At the outset, I believe that newly filed cases should

be “triaged” to assess settlement potential, whether such settlement occurs through the MSPB’s Mediation Appeals Program (MAP), or other means. Mediation at the early stages of litigation lessens the pressure that accompanies settlement at the “eleventh hour.” While early settlement is expedient, such settlement does not always reflect reality. For this reason, I support continued efforts to achieve settlement throughout the litigation process, whether encouraged (but not mandated) by the administrative judge or initiated by parties.

22. Do you believe the MSPB should play a role in promoting the use of ADR at other federal agencies and in training federal staff in ADR techniques? If so, how should that role be exercised? How should MSPB’s role be coordinated with, or differentiated from, the respective roles of other federal entities with similar responsibilities or interests to help ensure efficiency and consistency in federal workplace ADR policy and practice?

Answer:

I am a proponent for ADR and firmly believe that the MSPB has a viable role in both promoting and conducting ADR. Through outreach, the MSPB should promote its use by other Federal agencies, and provide instruction and guidelines that have proven successful for the MSPB. If not currently implemented, staff in both regional and field offices should be trained in mediation and early resolution techniques to assist administrative judges in this process, or to undertake the settlement function in lieu of the administrative judge. I believe that the MSPB should also share its lessons learned through ADR in an effort for Federal agencies to build, enhance or adapt the MSPB’s model to suit the needs of each agency. I do not believe that it is the MSPB’s role to implement or conduct such programs for Federal agencies.

23. According to some, the redress system for federal employees as a whole (involving the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Office of Special Counsel as well as MSPB) is lengthy, time consuming, costly, and sometimes misused, and offers the opportunity to “forum shop” in some situations. These are among the arguments that the Department of Homeland Security and the Department of Defense have apparently considered in developing proposed employee appeals options. Others have argued that the current arrangements for redress include necessary and appropriate mechanisms to perform the essential functions of protecting the federal workplace against political favoritism, retaliation, discrimination, and managerial abuse.
- a. What is your view about the current framework of the redress system for federal employees? Please explain the extent to which, if at all, you have concerns about the current process.



Answer:

Although potentially complicated and lengthy, I believe the current framework for redress available to Federal employees works. First, the corresponding regulations or case law for each named redress system has mechanisms and rules that provide for employee election. Once an employee chooses a forum, governing regulations in the remaining employee redress systems generally preclude simultaneous or cumulative filing.

b. Can you offer recommendations that could help improve the process? Please explain.

Answer:

I believe that any feasible recommendations should be discussed with the leadership from the named redress systems, along with staff and stakeholders. These discussions could be complicated and possibly lengthy. If confirmed, I would be open to such discussion. However, discussion alone cannot implement a new process. Any consensus obtained could result in joint petition of the policy makers for the appropriate legislative action.

24. A major statutory responsibility of the Board is adjudication of alleged violations of the Whistleblower Protection Act (WPA). What do you understand to be the purposes of the WPA? What is your understanding of the benefits or other potential impacts on the public interest from the robust protection of federal employees against retaliation for making disclosures protected under the WPA? What do you believe is the Board's mission in regards to whistleblower protection, and, if confirmed, how would you intend to help it be fulfilled?

Answer:

As stated by the statute, the purpose of the WPA is "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." The benefits to Federal employees include the mandate that they not suffer adverse consequences as a result of their efforts to report instances of fraud, waste or abuse in government programs or conduct that endangers public health or safety. The public interest is well served by eliminating fraud, waste, abuse, and unnecessary Government expenditures while protecting employees who disclose Government illegality, waste, and corruption in a major step toward a more efficient civil service. If confirmed, as chairman of the lead agency charged with protecting merit principles for Federal employees, I would zealously support these principles within the confines of law.

*Federal Redress System*

25. As mentioned in a previous question, the redress system for federal employees as a whole (involving the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the Office of Special Counsel, as well as MSPB) has been described by some as lengthy, time consuming, costly, sometimes misused, and offering the opportunity to “forum shop” in some situations. Others have argued that the current arrangements for redress include necessary and appropriate mechanisms to perform the essential functions of protecting the federal workplace against political favoritism, retaliation, discrimination, and managerial abuse. What is your view about the current framework of the redress system for federal employees? Please explain the extent to which, if at all, you have concerns about the current process. If you have such concerns, can you offer recommendations that could help improve the process? Please explain.

Answer:

Please see answer to question 23.

*Merit System Oversight*

26. MSPB is required to conduct “special studies” relating to the civil service and to other merit systems in the executive branch, and to report to the President and to Congress as to whether “the public interest in a civil service free of prohibited personnel practices is being adequately protected.”<sup>3</sup> What is your understanding of the value that MSPB can bring to the public interest through these studies? Do you believe there are issues or areas that warrant particular attention from MSPB under this authority?

Answer:

Under the statute, the Board conducts studies that are related to the civil service through independent, objective, non-partisan means. These studies monitor the Federal civil service environment to identify issues that impact or will impact agency operations in a manner consistent with the merit systems principles. Such independent studies support the public interest by identifying trends, practices, policies, and potential shortcomings of such practices and policies, with recommendations that will assist government agencies to manage the workforce effectively and efficiently. The reports, which in my experience, are relevant and often “ahead of their time,” are made available to the President and the Congress, and form the basis of discussion for agencies, employee organizations, and academia. If confirmed, I look forward to opportunities to explore possible topics of study with my fellow Board members, such as the impact and adaptation of workers to rapid technology changes, as well as integrating multiple generations into the Federal workforce. In addition, I understand the Office of Personnel

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<sup>3</sup> 5 U.S.C. § 1204(a)(3)

Management has released its Draft Strategic Plan for 2009 and has accepted public comment and I would encourage the Board to participate in the process to the extent allowed by law.

27. MSPB and the Office of Personnel Management (OPM) both have responsibility for oversight of the merit system and have issued reports on the merit system that identify similar issues. Also, both agencies have conducted surveys of the federal workforce (MSPB's Merit Principles Survey, and OPM's Human Capital Survey).
- a. What is your understanding of the differences that Congress intended in how these agencies should perform their respective oversight roles?

Answer:

The Office of Personnel Management has the dual role to propose and enforce civil service rules to ensure that Federal agencies comply with merit systems principles as well as to advocate for the administration's policies on Federal personnel issues. The MSPB is bipartisan by design and the independent protectorate of Federal merit systems to ensure that Federal employees are protected against abuses by agency management and that agencies make employment decisions in accordance merit systems principles. As such, the MSPB is charged with providing oversight of significant OPM actions and regulations to determine whether such actions are in accordance with the merit systems principles. For example, under 5 U.S.C.1204(f), the MSPB, on its own authority, can review such rules or regulation to determine validity.

- b. What is your understanding of the differences in how each agency currently performs these roles?

Answer:

I believe that both agencies are carrying out congressional intent.

- c. Should any changes be considered in the respective statutory responsibilities of MSPB and OPM for merit system oversight?

Answer:

I believe that the perspective of each agency is separate and distinct. OPM balances two roles—the execution and enforcement of civil service rules and regulations while responding to the administration's personnel management goals. MSPB, on the other hand, provides independent review of personnel actions of executive branch agencies. I believe the roles are balanced. I would not recommend any changes in the relationship of the two agencies at this time.

- d. Legislation aside, do you think it would be desirable for the two agencies to collaborate in conducting oversight?

Answer:

As stated above, the MSPB is charged with providing oversight of significant OPM actions and regulations to determine whether such actions are in accord with the merit systems principles. However, I believe open and consistent dialogue, communication, and coordination should be encouraged. Collaboration is always possible so long as it adheres to the principle mission of each agency as defined by statute. Unless future legislation allows, OPM must continue to serve as a rule maker and advocate of the administration's personnel policies, while the MSPB maintains a neutral, independent agency charged with the protection and enforcement of the Federal merit systems principles.

28. Do you believe that it is beneficial and appropriate for the MSPB to identify systemic and recurring issues in the cases that the Board reviews that, if addressed, could improve the federal government's civil service system and personnel practices and reduce the need for and costs of litigation? If so, how should MSPB go about identifying such systemic and recurring issues and how should agencies, employees, or Congress be made aware of these issues?

Answer:

I absolutely support the MSPB's efforts, through its study function by the issuance of reports, to identify systemic and recurring issues as a means to improve the civil service system. The consequential benefit of improving policy and practices while reducing the need and cost of litigation, would enhance employee morale and contribute to good government with heightened effectiveness and efficiency. I understand that these reports, coupled with the recommendations, are a source of information and means to enhance personnel systems consistent with the merit principles. I encourage the wide-spread dissemination and thorough review of such reports but recommend that such reports continue to contain a precise executive summary, including concise bullets so the public and the Board's stakeholders can quickly assimilate the contents and significance of each report. However, in an effort to preserve the quasi-judicial mandate of the MSPB, the Board's role in providing input into legislation affecting its adjudicatory function is limited. I understand that the MSPB maintains its own legislative counsel, whose responsibilities include keeping the Board's congressional oversight and appropriations committees apprised of significant agency programs and accomplishments, including issues impacting Federal employment. In addition, the Board, from time to time, provides testimony to Congress on various legislative initiatives as well as assessment of certain programs initiated by the agencies.

29. Under the WPA, retaliation against a federal-employer whistleblower for making a protected disclosure of waste fraud and abuse is considered a prohibited personnel practice (PPP), and the Office of Special Counsel (OSC) has particular responsibility to receive and act upon disclosures and to advocate on behalf of whistleblowers who suffer unlawful retaliation. How do you understand MSPB's authority, under 5 U.S.C. § 1204(a)(3), to report to the President and to Congress as to whether the OSC and others in the executive branch are adequately ensuring that whistleblowers are protected against unlawful retaliation?

Answer:

I believe that in furtherance of the MSPB's statutory responsibility to report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is adequately protected, the Board should conduct periodic studies that specifically examine whether agencies are providing such protection or redress for whistleblower retaliation. If not already in the planning stage, if confirmed, I would, as a priority, support undertaking special studies in this area.

30. What do you believe are the major challenges facing federal managers and other federal employees in today's and tomorrow's federal workplace, and what do you believe needs to be done to meet those challenges?

Answer:

From my experience at both NATCA and NFFE, and also in the context of my answer to question 12, the challenge is for federal managers to attract and keep highly motivated and trained employees. I believe that government agencies need to develop and enhance programs to recruit and mentor employees. Employees should be provided with sufficient training and room for career advancement. In order to inspire employees to be productive and contribute to their agency, managers must clearly define the agency's mission in plain terms so that employees know the value of individual contributions to that mission. Through these challenges, employees, along with managers, must be given stake in agency goals and be included in the development, implementation and promotion of such goals.

#### **IV. Relations with Congress**

31. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed as Chairman?

Answer:

Yes.

34. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed as Chairman?

Answer:

Yes.

**V. Assistance**

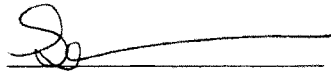
35. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.

Answer:

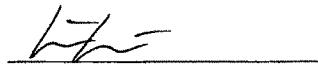
These answers are my own. I have consulted with MSPB staff with respect to some of these answers.

**AFFIDAVIT**

I, Susan Tsui Carundine, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.



Subscribed and sworn before me this 14th day of October, 2009.

  
Notary Public

ERIC FIALA  
Notary Public, District of Columbia  
My Comm. Expires May 14, 2014

**Senator Claire McCaskill  
Additional Questions for the Record  
Nomination Hearing of Susan Grundmann  
Post-Hearing Questions for the Record  
October 20, 2009**

1. Under Chairman McPhie the MSPB's 1-44 track record against whistleblowers for decisions on the merits has severely undermined the Board's legitimacy as the forum to adjudicate Whistleblower Protection Act cases, and was a catalyst for this Committee to include a provision for jury trials in the Whistleblower Protection Enhancement Act, S.372. In your opinion, does that track record reflect a just balance for whistleblower retaliation cases since 2003? If not, what is a fair balance? What are the causes for this breakdown? What leadership initiatives would you take to restore an acceptable balance?

Answer:

I am aware of the statistics purporting to show that the Board, and the Federal Circuit, which sets binding precedent for the Board to follow, rarely rule in support of whistleblowers. I understand that these statistics may only cover published Board decisions, which represent a limited percentage of cases filed with the MSPB in any given period. As such, I anticipate that such statistics do not account for settlement or other resolution to whistleblower filings. I also believe that this issue is covered under the Board's statutory duty to report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected. Such a study has not been conducted recently. If confirmed, I will, in conjunction with my fellow Board members, conduct such studies as a priority.

2. The provisions added in S.372 to provide whistleblowers with jury trial rights are somewhat complex. Should they become law, as Board Chair will you commit to specialized, in-depth training for Administrative Judges on the provisions of the Whistleblower Protection Enhancement Act to avoid confusion and temptation to reject the statutory provisions?

Answer:

Without reservation, if confirmed and if S. 372 becomes law, I would commit to such training. I would also provide Administrative Judges with the legislative history to assist them in applying and interpreting the Act.

3. In the 1980's and 1990's, the Board's Office of Merit Systems Review and Studies produced significant research on the health of the merit system generally, and specifically on whistleblowing. For the past 15 years, however, the flow of

information has dried up, and there have not been any new studies on whistleblowing. As Board Chair, will you renew this significant research?

Answer:

Yes. The Board's statutory studies function is a significant part of the agency's responsibility. If confirmed, I will work with the other Board members and the Office of Policy and Evaluation to conduct research on the health of the merit system generally and whistleblowing in particular.

4. There have been widespread complaints that, in order to issue speedy decisions, Administrative Judges deny employees adequate discovery to prove their cases, or wink at unreasonable agency refusals to comply with necessary discovery requests. Time pressure on Administrative Judges will increase, with new time deadlines beyond which a whistleblower will be able to remove a case to district court. What steps would you favor to restore a credible pre-hearing discovery process for MSPB litigation?

Answer:

I believe my answer to policy question 18 sheds light on a possible approach. If confirmed, I envision the creation of sample discovery materials available to both parties. The purpose of such samples would be to demystify the discovery process, particularly for *pro se* appellant and "first comers" to the MSPB. The second advantage would be to put both parties on notice as to possible interrogatories and requests for production of documents. Additionally, as I understand the provisions of S. 372 and the conditions under which cases are certified to the district court (e.g., multiplicity of claims, complex or extensive discovery, novel questions of law), these conditions represent cases that could potentially take additional time to process. As a result, certification to the district court would be an appropriate means of handling such issues if this legislation was enacted.

5. What is your view on the importance of the Office of Special Counsel for the Board's mission? What is your vision for how the Board should work with the Special Counsel? What is the importance of getting a new Special Counsel in place?"

Answer:

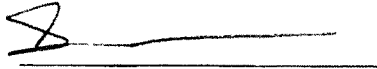
The Office of Special Counsel is of paramount importance to the Board's mission, which is to protect the Federal merit systems principles and the rights of employees within these systems. The Office of Special Counsel serves these purposes by providing a safe conduit for whistleblower disclosures, through thorough evaluation of whistleblower complaints, and by seeking corrective and/or disciplinary action to remedy prohibited personnel practices. As the Board



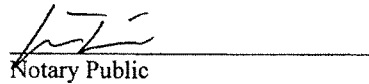
serves as the quasi-judicial protectorate of these vital principles and is charged with the adjudication of corrective and disciplinary action complaints brought by the Office of Special Counsel, the Board and the Office of Special Counsel are statutorily and necessarily separate and distinct entities. Nevertheless, I cannot overstate the importance of the role of Special Counsel. This position, as lead prosecutor of prohibited personnel actions, is critical to the fulfillment of the Board's statutory mandate.

#### AFFIDAVIT

I, Susan Sui Grundman, being duly sworn, hereby state that I have read and signed the foregoing Post-Hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.



Subscribed and sworn before me this 23<sup>rd</sup> day of October, 2009.

  
Notary Public

ERIC FIALA  
Notary Public, District of Columbia  
My Comm. Expires May 14, 2014

**Senator George V. Voinovich  
Additional Questions for the Record  
Nomination Hearing of Susan Grundmann  
October 20, 2009**

1. As the President's nominee to be Chairman of the Merit Systems Protection Board (MSPB), you will be tasked with serving as the Board's chief executive and administrative officer. What is the extent of your management experience? How will you adjust to handling management functions at this relatively small yet vital federal agency?

Answer:

Since 2000, I have served as general counsel to two separate federal labor unions, the National Federation of Federal Employees (NFFE) and the National Air Traffic Controllers Association (NATCA). In these capacities, I have served not only as an advocate for Federal employees, but also the representative of the unions' management with respect to the unions' own employees. I have created and implemented numerous personnel policies that impact the daily life of employees of these unions. In addition, I have supervised and reviewed the work product of staff and outside counsel on an on-going basis. Acting both individually and in collaboration with the unions' leadership, I have developed and pursued a wide range of strategies and initiatives intended to serve the interests of the unions' members.

I agree that the MSPB is a vital agency with a committed mission to ensure the Federal merit systems principles and the rights of employees within those systems. While the mission of the MSPB differs from the missions of both NFFE and NATCA, the unions I have worked for represent hundreds of bargaining units, locals, regional offices, and national councils. Similar to the MSPB, both NFFE and NATCA operate with small but diverse and highly trained staff. For nearly 20 years, I am accustomed to, have operated in, and successfully led organizations in a high paced work environment that function effectively and efficiently with limited resources.

2. I place great emphasis on ensuring that the MSPB serves as a fair and effective forum for all parties that may appear before the Board. Given your close association with federal labor unions, how will you maintain impartiality given the likelihood that you will be called on to issue decisions or establish precedent unfavorable to your former colleagues?

Answer:

Consistent with the ethics agreement I have signed with the MSPB, if confirmed, I will sever all ties with my current employer and with other federal labor organizations with which I have worked professionally. Additionally, I understand that if confirmed, I must not only uphold, but promote the independence, integrity and impartiality of the Board consistent with the ABA Model Code of Judicial Conduct. This includes the mandate to

avoid impropriety and the appearance of impropriety. While every judge, hearing officer, or neutral comes to the position with a unique background and personal philosophy, I realize and commit that if confirmed, I will follow appropriate precedent and apply and interpret the law without regard to whether I agree or disagree with the rule in question. This will be my approach to adjudicating cases if confirmed.

3. The MSPB anticipates an increase in its caseload owing to a variety of factors, including demographic shifts in the federal workforce and statutory and administrative changes in the Board's jurisdiction. In addition to moving to the simultaneous consideration of appeals by the Board, what additional methods could be useful for improving case processing time?

Answer:

If confirmed, I will explore ways to improve case processing times at the Board. First, in the context of simultaneous consideration of appeals by the Board, I understand that the MSPB had a previous practice whereby staff attorneys orally presented both sides of a case to the Board collectively on recommended opinions. Second, I am also open to the possibility of discussing with my fellow Board members the possibility of holding oral arguments between the parties in appropriate cases. I believe in the benefit of oral presentation to the extent that it serves to clarify, and possibly simplify complex issues and, hence expedite issuance of decisions on petitions for review.

4. In Fiscal Year 2009, the MSPB required an average of 83 days to issue initial decisions. Are you satisfied with this turnaround time? If not, what would be a more desirable or appropriate timeframe? What specific initiatives will you implement to improve processing time, and how will you measure their effectiveness?

Answer:

I believe that the 83 day timeframe is exceptional. At this point, I am unclear whether shortening the 83 day average is feasible or advantageous. The cited time frame allows for the requisite number of days for discovery, as well as time for receipt of documents by the parties if the parties do not choose to "e file." Shortening the timeframes could potentially cause parties, particularly pro se appellants, to feel rushed through the process and deprived of an opportunity to adequately prepare and present their case. The resulting perception, which defeats the purpose and mission of the MSPB, is that the process is not fair. While I believe that shortening the timeframe for initial decisions is difficult, I believe that the current timeframe should at least be maintained.

5. Do you feel that upgrading the Board's Administrative Judge positions to certified Administrative Law Judges selected through a competitive process would improve the quality of decisions issued by the MSPB?

Answer:

I believe that the quality of a decision is not solely measured by whether the decision is issued by an Administrative Judge or an Administrative Law Judge. As I state in my answers to questions 13 and 15 of the policy questions, there are multiple measures of quality including the clarity of the decisions and the extent to which the parties understand the decision and are guided by the decision in the future. I understand that previous Boards have reviewed upgrading the Board's Administrative Judges to certified Administrative Law Judges, but did not elect this course of action. If confirmed, I would be open to reconsidering this matter.

6. While the MSPB generally performs well on metrics of employee job satisfaction, in the 2009 edition of the Partnership for Public Service's *Best Places to Work* report, overall morale decreased 13 percent from 2007 levels. What specific policies or initiatives will you implement to halt and reverse this downward trend, if confirmed? What experience do you have in improving employee morale?

Answer:

Under its statutory special studies function, the MSPB issued "The Power of Federal Employee Engagement" on November 17, 2008. This study examines what contributes to a "heightened connection between Federal employees and their work or their organization." This study also contains multiple recommendations such as showing employees that they are valued, stimulating employee commitment, managing performance with the attention it deserves, mentoring employees, and perhaps most significantly, communicating vision on how agencies will accomplish their mission while showing commitment to employees. I embrace all these principles. If confirmed, I will make it a priority to ensure that each of these concepts and recommendations are, or have been, implemented at the Board.

My background has demonstrated to me that engaging employees at all levels and demonstrating to each how his or her contribution is vital to organizations' mission heightens employee commitment, performance, and ultimately morale. Employees, at all levels, need to understand that they are valued as individuals and as part of a team. The organizations for which I have worked have a demonstrated history of employee involvement, and as such, have been generally happy, productive institutions. If confirmed, I intend to carry this practice to the MSPB.

7. Last month, the MSPB's Office of Policy and Evaluation issued a report examining current authorities for employee discipline. According to the report's authors, front-line managers are reluctant to take appropriate disciplinary actions against poorly performing employees because they lack the training and resources necessary for tracking and evaluating employee performance. What role, if any, can the MSPB play in helping agencies address this gap?

Answer:

As I stated in my answers to policy questions submitted on October 14, 2009, I am an advocate of training for managers and supervisors on the importance of following agency procedures, and, collective bargaining agreement provisions (if applicable), and on MSPB's role in the process. In my experience, appellants and their advocates often feel compelled to challenge seemingly legitimate personnel actions because of failures to comply with applicable procedural protections. I have also seen personnel actions taken for the wrong reasons, which again, compels the employee or his/her advocate to react. I believe the MSPB should take an active role and reach out to managers, providing effective training on the merit systems principles, prohibited personnel actions, as well as the MSPB process. In addition, I believe that the MSPB could provide front-line managers, employees, and their advocates with simple "lessons learned" and common mistakes that should be avoided when taking personnel actions.

8. While it is important that federal managers abide by merit principles and statutory hiring requirements, I am also a strong supporter of providing federal agencies the tools they need to hire the best and brightest, including hiring flexibilities and performance incentives. Please discuss your views of how Congress and the executive branch can strike the proper balance between respecting merit principles and more effectively competing for top-flight talent.

Answer:

In 2008, the MSPB issued two reports relevant to this subject: "In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees from Outside the Federal Government" and "Attracting the Next Generation: A look at Federal-Entry Level New Hires." A number of these recommendations have been adopted by agencies, such as streamlining the hiring process so that qualified candidates are not lost by waiting months for an agency offer. Once hired, top-flight talent must be treated with respect and retained. Workplace incentives include competitive salaries and workplace flexibilities, such as telecommuting. Finally, my experience has taught me that executive branch agencies that have been successfully retained highly skilled staff have also been the most effective in succinctly and simply communicating the mission to their employees. I encourage both Congress, and the executive branch agencies to instill, from the outset, a clear vision that can be readily understood and embraced by its employees. Finally, as I state in my answer to question 6, I believe that actively engaging employees at all levels to support and sustain an agencies' mission ultimately enhances both agency and employee performance.

9. What principles will inform your review of rules and regulations issue by the Office of Personnel Management? What role will your fellow board members play in this process?

Answer:

Pursuant to 5 U.S.C. 1204(f)(1) and (2), the Board, whether on its own motion, on a petition for review, or on the filing of a written complaint by the Special Counsel requesting such review, may review whether any rule or regulation issued by the Director of the Office of Personnel Management (in carrying out functions under section 1103) is invalid on its face by requiring the employee to violate 5 U.S.C. 2302(b). I know of no other means by which the Board can act in the adjudicatory setting to review such rules or regulations. If confirmed, I will decide all such cases according to the law and facts in determining whether a particular provision or implementation of that provision requires an employee to commit a prohibited personnel practice.

10. As you noted in your prepared remarks, you intend to examine the extent to which whistleblower rights are protected in the federal sector, if confirmed. Do you have any additional areas of federal workforce policy in mind for further investigation by the Office of Policy and Evaluation?

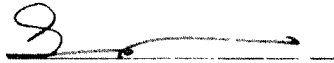
Answer:

I understand that the Office of Policy and Evaluation currently has a process whereby areas for special studies are chosen, studied, and published. As I stated at my confirmation hearing, I understand that there are currently four generations in the Federal workforce. With the advent of technological change now occurring at an exponential rate, the Board members should use the special studies function to evaluate the impact of this technological change on the Federal workforce and each of the generations it includes. In this context, I would also encourage an analysis of the impact on those who cannot easily adapt to such changes.

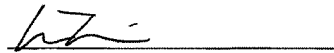
I also believe that in furtherance of the MSPB's statutory responsibility to report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is adequately protected, the Board should conduct periodic studies that specifically examine whether agencies are providing such protection or redress for whistleblower retaliation. If not already in the planning stage, if confirmed, I would, as a priority, support undertaking special studies in this area.

**AFFIDAVIT**

I, Susan Tsui Grenden, being duly sworn, hereby state that I have read and signed the foregoing Post-Hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.



Subscribed and sworn before me this 23<sup>rd</sup> day of October, 2009.



Notary Public

ERIC FIALA  
Notary Public, District of Columbia  
My Comm. Expires May 14, 2014

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Confirmation Hearing  
Statement for the Record  
Submitted by  
Anne M. Wagner, Nominee to be  
A Member of the Merit Systems Protection Board  
With the Designation of Vice Chairman**

**October 20, 2009**

Good afternoon, Chairman Akaka, Senator Voinovich, and members of the Committee. It is an honor to have been nominated by President Obama to serve as a Member of the Merit Systems Protection Board with the designation of Vice Chairman and a privilege to appear before you today to seek Senate confirmation of my nomination. I wholeheartedly support the statutory mission of the Board to protect Federal merit systems and the rights of individuals within those systems and, if confirmed, will commit myself fully to carrying out that mission.

In enacting the Civil Service Reform Act in 1978, Congress created a comprehensive system governing federal employment. The MSPB has a central role in that system to provide impartial adjudication of claims arising from personnel actions and to ensure that federal agencies make employment decisions in accordance with law and merit principles. The Board must carry out its quasi-judicial function in a fair and neutral manner, and it must provide meaningful redress when violations occur.

Having practiced federal employment law in various capacities for over twenty years I am particularly mindful of the continued importance of the MSPB to the communities that it serves as well as to the American public. Although much has changed since the Board's inception in 1978, the need to ensure that the federal workplace operates in an equitable and effective manner has not. Congress bestowed this duty on the MSPB and I am humbled by the opportunity to serve as a Member of such a vital organization.

If confirmed, I very much look forward to working with Susan Grundmann, whose nomination as Board Chairman is also before you today, and with Board Member Mary Rose in meeting the challenges facing the Board. Thank you for the opportunity to be with you today and I am happy to answer any questions that you or other members of the Committee may have.



**United States Senate**  
**COMMITTEE ON**  
**HOMELAND SECURITY AND GOVERNMENT AFFAIRS**  
**ROOM SD-340**

**A. BIOGRAPHICAL INFORMATION**

- 1. Name:** Anne Marie Wagner
- 2. Position to which nominated:** Vice-Chair, Merit Systems Protection Board
- 3. Date of nomination:** July 31, 2009
- 4. Address:** REDACTED
- 5. Date and place of birth:** 12/3/1957 Chicago, Illinois
- 6. Marital status:** Married Allynn Lawrence Howe
- 7. Names and ages of children:** Kathleen Elizabeth Howe (18)  
REDACTED  
Carlin Allynn Howe (33) - Stepdaughter
- 8. Education:**
  - a. George Washington University 1982-1985 JD May 1985
  - b. University of Notre Dame 1975-1979 BA May 1979
  - c. L'Universite Catholique 1976-1977 --  
de l'Ouest (through Notre Dame)
  - d. Mother McAuley Liberal Arts HS 1971-1975 Diploma May 1975

**9. Employment Record:**

- a. General Counsel, Personnel Appeals Board, U.S. Government  
Accountability Office, Washington, D.C. April 2006-present
- b. Member, Personnel Appeals Board, U.S. Government  
Accountability Office, Washington, D.C. December 1999-June 2005
- c. Assistant General Counsel, American Federation of Government  
Employees, Washington, D.C. October 1986 – April 2006
- d. Staff Counsel, General Services Administration, Washington, D.C.  
May 1985-October 1986
- e. Law Clerk, General Services Administration (part time during  
school year, full time in summers), Washington, D.C.  
June 1983-May 1985
- f. Intern, U.S. Attorney's Office, Washington, D.C.  
January 1985-May 1985
- g. Administrative Assistant (Food Services), George Washington  
University, Washington, D.C. September 1982-June 1983
- h. Editorial Assistant for *The Great Ideas Today* published by the  
Encyclopaedia Britannica, Inc. Chicago, IL  
January 1981-August 1982
- i. Editorial Indexer, Encyclopaedia Britannica, Inc. Chicago, IL  
February 1980-January 1981
- j. Accounts Assistant, Merrill Lynch Pierce Fenner & Smith, Chicago, IL  
October 1979-February 1980
- k. Waitress, La Hacienda Restaurant, Mishawaka IN  
June 1979-August 1979

**10. Government experience:** See above

**11. Business relationships:**

- a. Member, Board of Governors, Paul VI Catholic HS  
(voluntary/nonprofit) November 2005-present
- b. Secretary/Treasurer, National Democratic Ethnic Leadership  
Council (voluntary/nonprofit 527) April 2004-April 2005

**12. Memberships:**

- |                                |                       |
|--------------------------------|-----------------------|
| a. D.C. Bar Association        | December 1992-present |
| b. National Democrats for Life | 2005-present          |

**13. Political affiliations and activities:**

- a. List all offices with a political party which you have held or any public office for which you have been a candidate.**

None

- b. List all memberships and offices held in and services rendered to any political party or election committee during the last 10 years.**

National Democratic Ethnic Leadership Council, Secretary-Treasurer, April 2004 - April 2005

- c. Itemize all political contributions to any individual, campaign organization, political party, political action committee or similar entity of \$50 or more during the past 5 years.**

None

**14. Honors and awards:**

In May 2008, I was a recipient of a Volunteer of the Year award recognizing "outstanding contributions to the Catholic Schools of the Diocese of Arlington" signed by Dr. Timothy J. McNiff, then Superintendent of Schools for the Arlington Diocese and Wayne F. Cyron, President of the Catholic Business Network of Northern Virginia.

**15. Published writings:**

Mark Roth, Gony Frieder, and Anne Wagner, *Job Security and Bargaining Rights of Federal Government Employees*, 8 UDC/DCSL L.Rev. 153 (2004).

**16. Speeches:**

- (a) **Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. Provide copies of any testimony to Congress, or to any other legislative or administrative body.**

Testimony before House Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia and the Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, on GAO's implementation of the Human Capital Reform Act of 2004 (May 7, 2007).

Testimony before House Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, Hearing on H.R. 3268, "Government Accountability Office Act of 2008" (March 13, 2008).

- (b) **Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it.**

None.

**17. Selection:**

- (a) **Do you know why you were chosen for this nomination by the President?**

I believe that I was chosen for this nomination because my extensive experience in federal sector employment law as an employee advocate, neutral adjudicator, and prosecutor makes me well-qualified to carry out the duties of Vice-Chair of the Merit Systems Protection Board.

- b. **What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment.**

The Personnel Appeals Board (PAB) was created by Congress to provide GAO employees a forum for adjudicating various types of claims arising out of the employment relationship. Because of GAO's size, Congress integrated within the PAB the functions performed by the Merit Systems Protection Board, the Office of Special Counsel, the Federal Labor Relations Authority, and the Equal Employment Opportunity Commission

in the Executive branch. My 5-year statutory term as Member of the PAB and my experience as its General Counsel have given me a unique opportunity to perform the same functions that are carried out by the MSPB, albeit on a smaller scale.

Historically, the PAB looks to the MSPB for precedential authority and, therefore, my experience with the PAB has deepened my existing knowledge of the substantive law and principles governing adjudication at the MSPB gleaned from nearly twenty years as a litigator with the American Federation of Government Employees, AFL-CIO (AFGE). During my tenure with AFGE, I handled a number of cases arising from the MSPB. As such, I will bring to the position of Vice-Chair a broad and deep knowledge of the MSPB and its decision-making.

#### **B. EMPLOYMENT RELATIONSHIPS**

- 1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?**

Yes.

- 2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensations, during your service with the government?**

No.

- 3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization, or to start employment with any other entity?**

No.

- 4. Has anybody made a commitment to employ your services in any capacity after you leave government service?**

No.

- 5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?**

Yes.

- 6. Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis?**

No.

**C. POTENTIAL CONFLICTS OF INTEREST**

- 1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated?**

In connection with the nominations process, I have consulted with the Office of Government Ethics and the designated agency ethics officer for the MSPB, in an effort to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the MSPB's designated agency ethics official, which has been provided to the Committee. I am not aware of any other potential conflicts of interest.

- 2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.**

While serving as Assistant General Counsel at AFGE, I participated in litigation challenging certain policies and practices that allegedly violated the constitutional, statutory, or contractual rights of federal and District Government employees. I also participated in litigation that challenged the constitutionality of certain federal statutes. For example, I participated in challenges to the honoraria ban and to defense appropriations language allowing the Department of Defense to forego competitive processes when contracting out to Native Alaskan entities. I also participated in a challenge of the Food Safety and Inspection Service's effort to forego certain inspections at meat packing facilities. In addition, I attended approximately 5 to 10 meetings with members of Congress and their staffs to discuss the litigation described above.

- 3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this positions?**

Yes.

**D. LEGAL MATTERS**

- 1. Have you even been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group?**

No.

- 2. Have you even been investigation, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense?**

No.

- 3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation?**

In 2006, an employee of the Personnel Appeals Board (PAB) at GAO filed a series of EEO complaints alleging age, race, and sex discrimination, retaliation, and a hostile work environment. The claims involved multiple alleged non-promotions and reprimands, some of which allegedly occurred prior to my employment at PAB, and others that I allegedly participated in after I became PAB General Counsel. In 2007, the employee sued GAO based on the same claims. I was not a party to this case. The U.S. District Court for the District of Columbia dismissed the majority of the claims on summary judgment. *Williams v. Dodaro*, 576 F.Supp.2d 72 (D.D.C. 2008). Two remaining claims are pending. In January 2009 the PAB terminated the employee, and she subsequently filed additional claims against GAO. GAO has filed a motion for summary judgment with respect to these claims, which is pending.

- 4. For responses to question 3, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity?**

Please see my response to Question 3, above.

**E. FINANCIAL DATA**

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

Dated: 9/8/2009

Anne M. Wagner  
Anne M. Wagner

**AFFIDAVIT**

I, Anne M. Wagner, being duly sworn, hereby state that I have read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Anne M. Wagner

Subscribed and sworn before me this 8th day of September  
2009.

Patricia V. Reardon-King  
Notary Public

Patricia V. Reardon-King  
Notary Public, District of Columbia  
My Commission Expires 4/30/2014





United States  
**Office of Government Ethics**  
1201 New York Avenue, NW, Suite 500  
Washington, DC 20005-3917

August 5, 2009

The Honorable Joseph I. Lieberman  
Chairman  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Anne M. Wagner, who has been nominated by President Obama for the position of Member of the Merit Systems Protection Board.

We have reviewed the report and have also obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

A handwritten signature in black ink, appearing to read "Don W. Fox".

Don W. Fox  
General Counsel

Enclosures - REDACTED

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Pre-hearing Questionnaire for the  
Nomination of Anne M. Wagner to be  
A Member of the Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Why do you believe the President nominated you to serve as a member of the Merit Systems Protection Board ("MSPB" or "the Board")?

I believe that I was chosen for this nomination because my extensive experience in federal sector employment law as an employee advocate, neutral adjudicator, and prosecutor makes me well qualified to carry out the duties of a Member and Vice-Chair of the Merit Systems Protection Board.

2. Were any conditions, expressed or implied, attached to your nomination to the Board? If so, please explain.

No.

3. What specific background and experience affirmatively qualifies you to be a member of the MSPB?

**The Personnel Appeals Board (PAB) was created by Congress to provide GAO employees a forum for adjudicating various types of claims arising out of the employment relationship. Because of GAO's size, Congress integrated within the PAB the functions performed by the Merit Systems Protection Board, the Office of Special Counsel, the Federal Labor Relations Authority, and the Equal Employment Opportunity Commission in the Executive branch. My 5-year statutory term as Member of the PAB and my experience as its General Counsel have given me a unique opportunity to perform the same functions that are carried out by the MSPB, albeit on a smaller scale.**

Historically, the PAB looks to the MSPB for precedential authority and, therefore, my experience with the PAB has deepened my existing knowledge of the substantive law and principles governing adjudication at the MSPB gleaned from nearly twenty years as a litigator with the American Federation of Government Employees, AFL-CIO (AFGE). During my tenure with AFGE, I handled a number of cases arising from the MSPB. As such, I will bring to the position of Member and Vice-Chair a broad and deep knowledge of the MSPB caselaw and its adjudicatory procedures.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as a member of the MSPB? If so, what are they and to whom have the commitments been made?

No.

5. If confirmed as a member of the MSPB, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will resign from my position as General Counsel of the Personnel Appeals Board of the Government Accountability Office. For one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which the Personnel Appeals Board is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

Upon confirmation, I will resign from my position as a Member of the Board of Governors of Paul VI High School. For one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which Paul VI High School is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

My spouse owns a consulting business, Government Relations Consulting (GRC). I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of GRC, unless I first obtain a waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which any client of GRC or my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). For the duration of my appointment as Vice Chair, my spouse has agreed not to communicate with the Merit Systems Protection Board on behalf of GRC or any of his clients.

## **II. Role and Responsibilities of a Member of the MSPB**

6. What is your view of the role of a member of the MSPB?

The role of a member of the MSPB is to carry out the functions of the Board as set forth in 5 U.S.C. §1204, which includes adjudicating claims within the jurisdiction of the Board, conducting studies relating to the civil service and reporting to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practice is being adequately protected, and reviewing rules and regulations of the Office of Personnel Management.

7. The Chairman of the MSPB has the statutory responsibility of serving as "the chief executive and administrative officer of the Board."<sup>1</sup> With respect to the management and administration of the MSPB, what are your views of the respective rights and responsibilities of the Chairman and the other members of the Board?

While the Board has statutory powers to carry out the functions described in 5 U.S.C. §1204, Congress gave the Chairman the additional statutory duty as chief executive and administrative officer, which means, in my view, that she is responsible for managing the Board's day-to-day operations. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman is statutorily required to perform the functions vested in the Chairman. During the absence or disability of both the Chairman and Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board Member is statutorily required to perform the functions vested in the Chairman.

8. In your view, what are the major internal and external challenges facing MSPB? What, specifically do you plan to do as a member of the Board to address these challenges?

Assuming that the internal challenges facing the MSPB arise from the agency's culture, management practices and processes, I lack the requisite experience within the organization to provide an accurate assessment of any issues concerning these matters. If confirmed, I look forward to exploring these issues. Defining external challenges as those arising from economic, social, political or technological occurrences outside the agency, as well as new statutory or judicial requirements, it is foreseeable that ongoing military deployments may result in an increase in the number of claims under USERRA and VEOA. Similarly, as more federal employees retire, there may be additional claims concerning retirement benefits. If confirmed as a Member of the MSPB, I will work closely with the Chairman to ensure that the Board functions in an effective and efficient manner.

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<sup>1</sup> 5 U.S.C. § 1203(a).

9. What lessons learned could you bring to service as a member of the MSPB based on your experience as general counsel of the Personnel Appeals Board (PAB) of the Governmental Accountability Office (GAO)?

For the past twenty years, I practiced federal employment law as General Counsel and as Member of the Personnel Appeals Board, and as a litigator with the American Federation of Government Employees, and as staff counsel with the U.S. General Services Administration. Having practiced in areas governed primarily by federal statutes, I have acquired a deep appreciation for the tenets of statutory interpretation, primarily the foremost requirement to give effect to the will of Congress. As a manager, I have learned that collaborative effort is essential to achieving the mission of an agency and that the quality of legal analysis is enhanced by a robust exchange of ideas with colleagues about the underlying issues.

### **III. Policy Questions**

#### *MSPB Case-Management and Procedures*

10. The Board has established performance goals for itself that include the issuance of high-quality decisions (which is measured in terms of cases that are not changed, reversed, or remanded on review), and the issuance of timely decisions. (See MSPB, Performance and Accountability Report for Fiscal Year 2008, November 17, 2008). Other performance goals related to the adjudication function include controlling average case processing cost, and achieving high rates of case settlement. What is your opinion of the performance goals established by the Board? Do you believe any adjustments may be desirable, and if so, what?

The MSPB's goal of issuing high-quality and timely decisions in a cost effective way is appropriate and commendable. However, I do not believe that the quality of decisions can be measured only in terms of cases that are not changed, reversed, or remanded on review. While that may be a relevant metric, there are other elements that also reflect the quality of a decision. For example, a decision that sets forth a cogent and thorough analysis in a clear and concise way advances the MSPB's strategic goal of providing high quality decisions without regard to the ultimate outcome on review.

With regard to settlement, voluntary resolution of employment disputes is a very effective way to achieve the Board's mission. In the last five years, the Board has instituted its Mediation Appeals Program (MAP) to provide parties with the services of trained and certified mediators. This Program results in the settlement of 60% of cases and, upon completion of the mediation process, 95% of participants reported that they would use the MAP again. This type of objective and systematic approach to settlement clearly provides the parties with confidence

that negotiating their own dispute resolution can achieve fair and equitable outcomes.

11. In your view, what are some options for timelier decision making? Specifically, what do you believe that you, as a member of the MSPB, could and should do to expedite Board review, while maintaining fairness and quality in decision-making?

Without having the opportunity to look at the internal operations of the MSPB, it is difficult to identify particular points in the process that may be the source of undue delay and could be eliminated. However, it is my understanding that the Board Members continue to consider cases sequentially. It seems to me that this is less efficient than having a case reviewed at the same time by the Members and their staffs. This approach might also lend itself to a more expeditious resolution of issues through regularly scheduled discussions of cases between Members and staff, with due regard for Sunshine Act requirements.

12. Timeliness is one measure of performance. Quality of decisions is another measure. How can the competing goals of quality and timeliness be balanced? Do you believe that measuring the numbers of cases not changed, reversed, or remanded on review is the best measure the quality of decisions; should other measures be considered?

Timeliness and quality need not necessarily be competing goals, but there is no question that there must be a balance between the two. One way to achieve this balance – and the Board may already do this – is to perform an initial assessment of the complexity of a case upon filing and establish differential timeframes accordingly. Another potential avenue to achieve a balance at the Board level is to adopt a collaborative approach, between Board members and their staffs and the Office of Appeals Counsel, and to process decisions simultaneously, rather than sequentially, among the Board Members. As I stated in response to Question 10, measuring the number of cases not changed, reversed, or remanded on review is not the only or best measure of quality, in my view. Other factors, such as the depth of analysis and clarity of the decision, are also indicators of quality.

13. Do you believe that a performance management system is desirable for administrative judges and attorneys and should they be aligned to the MSPB's performance goals? What do you consider to be the advantages and disadvantages of such a linkage, and what changes, if any, would you advocate as a member of the MSPB?

A fair and effective performance management system provides employees and managers with explicit performance expectations and objective standards by which to assess performance. Generally, I believe that performance standards should be aligned with the organization's overall mission and strategic goals. The MSPB's mission is to protect Federal merit systems and the rights of individuals within those systems, and its strategic goal is to provide fair, high quality, timely and cost effective adjudication of cases filed with the MSPB. Because the work of the Board's administrative judges and attorneys is so integral to achieving its mission and meeting its strategic goals, it seems reasonable to align their performance expectations and standards with those of the Board. An advantage of clearly linking the two is to promote the sense of shared responsibility for achieving the agency's mission. A disadvantage would be the danger that the performance of administrative judges and attorneys would be evaluated based solely on quantifiable data, such as the number and time of cases processed or the ultimate disposition of a case on review. In my view, this would not be a fair and accurate measure of performance.

14. The appeals process administered by MSPB has been characterized by some as cumbersome. What is your opinion about the balance MSPB should strive for between making its processes "user friendly" to individual parties and yet appropriate to deal fairly and consistently with the complex issues presented to it? How can that balance be achieved?

Accessibility to any judicial or quasi-judicial forum is essential to the integrity of the process. Employees and managers must have confidence that the MSPB's process is open and transparent if the Board is going to achieve its mission of protecting federal merit systems and the rights of individuals within those systems. At the same time, however, the fact remains that federal sector employment law is complex. In addition, managing any evidentiary process – whatever the claim – requires knowledge even where, as in an MSPB hearing, the formal rules of evidence do not apply. However, these factors need not be obstacles to an individual's proficient participation in the process, where, as here, the Board maintains a "user friendly" website that has relevant information for pursuing an appeal, such as regulations, practices, and forms as well as a term searchable database of all Board decisions issued since 1980.

15. The appeals process can be daunting for appellants, particularly those not represented by an attorney. Do you believe that MSPB assist *pro se* appellants in exercising their rights to due process? If so, what assistance should MSPB provide? Are there any other things that you believe MSPB can and should do to reduce the burden on appellants?

I believe that it is appropriate for the Board to provide parties, and in particular, *pro se* appellants, with procedural advice and assistance. As I stated above, the Board's website is a significant resource for a *pro se* appellant. In addition, I understand that the Board has produced videotapes explaining the process, which are available for use by *pro se* appellants. Furthermore, Board policy mandates at least one prehearing or status conference in each case, the purpose of which is to provide an opportunity for the judge to explain the Board's procedures to the parties, to help them identify and narrow the issues, to facilitate discovery and to discuss the possibility of settlement. In addition, at the hearing itself, the judge must take "all necessary action to ensure adequate development of the record." Consequently, while the process may seem daunting to *pro se* litigants unfamiliar with it, there are safeguards to ensure that they can nonetheless effectively represent themselves before the Board.

16. MSPB surveys show that some managers avoid taking appropriate personnel actions against employees because of what they perceive to be a burdensome appeals process. However, then-Acting Chairman Marshall stated to this Committee in March 2003 that MSPB research "clearly shows that there are reasons for this reluctance other than the Board's appeal process itself. These reasons include insufficient training and knowledge, a belief that higher-level managers will not support taking action, and agency-imposed procedures and documentation."<sup>2</sup> What is your opinion on this matter, and what, if anything, do you believe MSPB can and should do to reduce the burden on managers who take appropriate personnel actions?

My observations as a federal employment law practitioner support Ms. Marshall's remarks that managerial reluctance to take action is often attributable to reasons other than a perception about the MSPB's appeals process. The statute gives agencies and managers clear authority and flexibility to take personnel actions. It is true that due process dictates that, in the case of serious actions such as removals and substantial suspension, federal employees have a right to challenge such decisions before an impartial third-party such as the Board. Congress properly placed the burden on the agency to prove that it acted in accordance with law in taking the action. It is not within the MSPB's purview to adjust this statutory burden. However, the MSPB perhaps could undertake additional efforts to reach out to all of its stakeholders, including agency managers, to provide them

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<sup>2</sup> S. Hrg. 108-185 (June 4, 2003), at page 55.



with guidance as to the federal employment system generally and the MSPB's process.

17. Some cases require lengthy and complex decisions. What do you believe can be done to help ensure that the Board's decisions are written in such a manner that they can be easily understood and implemented by both agencies and employees?

The claims and issues in any given case will likely dictate the length and complexity of the decision. However, there are a number of ways that the decision can be drafted to assist the reader in comprehending the ruling. For example, the Board's suggested uniform approach to the organization of an initial decision - with subsections for the introduction, jurisdiction, background, analysis and findings, and decision - sets out the primary elements of the decision in a coherent fashion. Judges are further instructed to use headings and subheadings in order to help the reader navigate the decision more easily. Also, initial decisions in complex cases are always subject to another level of review before issuance, which should enhance the likelihood that the decision will be intelligible to a reader who is not as familiar with the case as the judge.

18. One factor that helps reduce average case processing time and conserve agency resources is the settlement of cases. Indeed, the MSPB has established a performance goal for itself that at least 50% of initial appeals that are not dismissed should be settled, and the Board has well exceeded that goal. (See MSPB, Performance and Accountability Report for Fiscal Year 2008, November 17, 2008, at page 17).

- a. What is your view of that goal and of how it can best be achieved and exceeded?

As stated in my response to Question 10, the voluntary resolution of employment disputes is a very effective way to achieve the Board's mission. However, I do not believe that establishing a quota with regard to the number of cases to be settled is necessary and may lead to overt or tacit pressure, or the appearance of pressure, to settle cases. The Board's Mediation Appeals Program appears to be an effective means of reaching settlements

- b. What role, if any, do you believe the MSPB should exercise in to help ensure that parties do not feel undue pressure to enter into settlements that might be unfair, unwise, or without due process?

The MSPB should take a very active role to ensure that parties do not feel undue pressure to enter into settlements that might be unfair, unwise, or without due process. For example, before dismissing an appeal on the basis of a settlement, the administrative judge should discuss the settlement with the parties to determine that the appellant fully understands and agrees with its terms. Also, upon request of the parties, a settlement judge should be assigned to the matter so

that the parties fully understand the consequences of any potential settlement. In addition, the Board should suspend the processing of a case for a period of time to allow more time for settlement discussions so that the parties do not feel rushed into an agreement.

19. Do you believe the MSPB should play a role in promoting the use of alternative dispute resolution (ADR) at other federal agencies and in training federal staff in ADR techniques? If so, how should that role be exercised? How should MSPB's role be coordinated with, or differentiated from, the respective roles of other federal entities with similar responsibilities or interests to help ensure efficiency and consistency in federal workplace ADR policy and practice?

Because of the MSPB's success with alternative dispute resolution, I would endorse an initiative to have the MSPB play a role in promoting the use of alternative dispute resolution (ADR) for use by other federal agencies. Depending on the availability of resources, I would also support expanding the MSPB's role to include training federal staff in ADR techniques. I would expect that the MSPB could work effectively and coordinate its efforts with other federal entities having similar responsibilities to develop best practices in ADR for use throughout the federal government without unnecessarily duplicating efforts by other agencies.

20. According to some, the redress system for federal employees as a whole (involving the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Office of Special Counsel as well as MSPB) is lengthy, time consuming, costly, and sometimes misused, and offers the opportunity to "forum shop" in some situations. These are among the arguments that the Department of Homeland Security and the Department of Defense have apparently considered in developing proposed employee appeals options. Others have argued that the current arrangements for redress include necessary and appropriate mechanisms to perform the essential functions of protecting the federal workplace against political favoritism, retaliation, discrimination, and managerial abuse.

- a. What is your view about the current framework of the redress system for federal employees? Please explain the extent to which, if at all, you have concerns about the current process.

When Congress enacted the Civil Service Reform Act in 1978, its intent was to establish a comprehensive system governing various aspects of federal employment, including dispute resolution. Each of the agencies mentioned, i.e., the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Office of Special Counsel, as well as the Merit Systems Protection Board, has jurisdiction with regard to discrete claims and issues. Thus, the MSPB deals with individual employment claims; the FLRA deals with labor-management relations, the EEOC addresses discrimination; the Special Counsel

prosecutes prohibited personnel practices and Hatch Act violations. These agencies deal with distinct areas of law and have developed the particular expertise to address the often complex cases and questions that come before them. The jurisdictional boundaries of these agencies do not, for the most part, overlap, and therefore, there is little danger of “forum-shopping.” Moreover, where overlap does exist in the context of discrimination claims, Congress created the Special Panel as a mechanism for addressing and reconciling any points of disagreement between the EEOC and the MSPB.

- b. Can you offer recommendations that could help improve the process? Please explain.

The prescribed processes for redressing federal employee claims can be lengthy and costly. However, as described above, the MSPB does appear to have undertaken a number of efforts to reduce the time and cost associated with its appellate process. If confirmed as Member, I will continue these efforts to ensure that parties to the process receive timely and high-quality decisions.

21. A major statutory responsibility of the Board is adjudication of alleged violations of the Whistleblower Protection Act (WPA). What do you understand to be the purposes of the WPA? What is your understanding of the benefits or other potential impacts on the public interest from the robust protection of federal employees against retaliation for making disclosures protected under the WPA? What do you believe is the Board’s mission in regards to whistleblower protection, and, if confirmed, how would you intend to help it be fulfilled?

The purpose of the Whistleblower Protection Act is to protect federal employees from being retaliated against in their employment for making protected disclosures (relating to a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety). The benefit to the public interest in the robust protection of federal employees against retaliation for making disclosures protect under the WPA is that it provides one of the most vital means of protecting the integrity and accountability of the federal government to its citizens. The Board’s mission with regards to whistleblower protection is to enforce the law prohibiting retaliation against whistleblowers and, if confirmed, I intend to carry that mission out with vigilance and tenacity.

#### *Merit System Oversight*

22. MSPB is required to conduct “special studies” relating to the civil service and to other merit systems in the executive branch, and to report to the President and to Congress as to whether “the public interest in a civil service free of prohibited personnel practices is

being adequately protected.<sup>34</sup> What is your understanding of the value that MSPB can bring to the public interest through these studies? Do you believe there are issues or areas that warrant particular attention from MSPB under this authority?

The MSPB's statutory function to conduct studies of the civil service instills public confidence that federal employment policies and programs are being implemented in a fair, efficient and effective manner consistent with merit principles. The Board's bipartisan composition ensures that this oversight is carried out without regard to political considerations. Moreover, as an independent agency, the Board is able to conduct a dispassionate and impartial review of the federal government's employment practices, which is essential to instilling public trust in the system itself. The studies that the Board has undertaken to date cover a wide range of topics and address current issues. Although most federal employees continue to be paid under the General Schedule, I believe that a worthwhile study for the Board in the future might be to examine pay-for-performance systems, especially with regard to their relationship to performance appraisal systems.

23. MSPB and the Office of Personnel Management (OPM) both have responsibility for oversight of the merit system and have issued reports on the merit system that identify similar issues. Also, both agencies have conducted surveys of the federal workforce (MSPB's Merit Principles Survey, and OPM's Human Capital Survey).

- a. What is your understanding of the differences that Congress intended in how these agencies should perform their respective oversight roles?

Congress created OPM to devise, execute and administer personnel management rules, regulations and policies governing the federal workforce. OPM promotes the President's personnel initiatives. OPM reviews executive branch agencies' use of delegated personnel authorities and their compliance with laws and regulations, and it assesses federal and agency personnel practices.

Congress gave MSPB authority to review OPM's rules and regulations, policies, and actions that affect the civil service as a whole. The MSPB conducts independent oversight of the federal government's compliance with merit principles. The Board reports to Congress and the President with regard to the civil service and merit systems. Congress structured the MSPB to perform this function independently.

- b. What is your understanding of the differences in how each agency currently performs these roles?

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<sup>3</sup> 5 U.S.C. § 1204(a)(3).

The OPM and MSPB carry out their respective oversight roles consistent with the intent of Congress. Specifically, OPM performs its oversight function as the agency charged with implementing and administering personnel policies and as an advocate for the President's personnel initiatives. MSPB conducts its oversight function as an independent entity for the purpose of ensuring that the federal workforce is free from prohibited personnel practices.

- c. Should any changes be considered in the respective statutory responsibilities of MSPB and OPM for merit system oversight?

The oversight functions performed by OPM and the MSPB serve distinct purposes, and I do not currently have any recommendations for changes in the respective statutory responsibilities of the MSPB and OPM for merit system oversight.

- d. Legislation aside, do you think it would be desirable for the two agencies to collaborate in conducting oversight?

Although the difference in the underlying purposes served by the oversight performed by OPM and MSPB would make consolidation inappropriate, collaboration would be appropriate under circumstances that would not compromise the MSPB's independent oversight authority.

24. Do you believe that it is beneficial and appropriate for the MSPB to identify systemic and recurring issues in the cases that the Board reviews that, if addressed, could improve the federal government's civil service system and personnel practices and reduce the need for and costs of litigation? If so, how should MSPB go about identifying such systemic and recurring issues and how should agencies, employees, or Congress be made aware of these issues?

I believe that it is beneficial and appropriate for the MSPB to identify systemic and recurring issues that could improve the federal government's civil service system, and I believe the MSPB should continue to address those issues in the reports issued by its Office of Policy and Evaluation. Moreover, I believe that, under some circumstances, trends that the Board detects in its adjudication may properly be the basis of an MSPB study. However, protecting the Board's statutory role as an adjudicative agency is essential and, therefore, the relationship between its adjudicative and reporting roles must be carefully managed so as not to give rise to any appearance of prejudging a case or deciding claims based on evidence that may not be part of the record in the case. The Board informs agencies, employees and Congress regarding systemic and recurring issues through the publication of its reports, the discussion of significant cases in its newsletter, *Issues of Merit*, and attendance at conferences, seminars and other venues.

25. Under the WPA, retaliation against a federal-employer whistleblower for making a protected disclosure of waste fraud and abuse is considered a prohibited personnel practice (PPP), and the Office of Special Counsel has particular responsibility to receive and act upon disclosures and to advocate on behalf of whistleblowers who suffer unlawful retaliation. How do you understand MSPB's authority, under 5 U.S.C. § 1204(a)(3), to report to the President and to Congress as to whether the OSC and others in the executive branch are adequately ensuring that whistleblowers are protected against unlawful retaliation?

The MSPB's authority under 5 U.S.C. § 1204(a)(3) is to report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected. Although the MSPB would not be able to issue a finding under its reporting authority regarding any particular whistleblower claim pending with the Special Counsel, I believe that such authority could be properly exercised otherwise to address whether the OSC and others in the executive branch are adequately ensuring that whistleblowers are protected against unlawful retaliation.

26. What do you believe are the major challenges facing federal managers and other federal employees in today's and tomorrow's federal workplace, and what do you believe needs to be done to meet those challenges?

Two major challenges facing federal managers and employees are succession planning and the recruitment and retention of talented employees. With regard to the latter, I believe that aggressive recruitment campaigns at colleges and universities, as well as intern and professional development programs, are just a few measures that can be taken to address this challenge. Succession planning requires development and mentoring programs. If confirmed as a Member of the MSPB, I look forward to working with the Chairman and Board staff to devise creative and effective solutions to these challenges for the MSPB.

#### **IV. Relations with Congress**

27. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed as a member of the MSPB?

Yes.

28. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed as a member of the MSPB?

Yes.

**V. Assistance**

29. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.

These answers are my own. I consulted with MSPB staff while preparing my responses.

**AFFIDAVIT**

I, Anne M. Wagner, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Anne M. Wagner

Subscribed and sworn before me this 17th day of October, 2009.

Patricia V. Reardon-King  
Notary Public

Patricia V. Reardon-King  
Notary Public, District of Columbia  
My Commission Expires 4/30/2014

**Senator George V. Voinovich**  
**Additional Questions for the Record**  
**Nomination Hearing of Anne Wagner**  
**October 20, 2009**

1. I place great emphasis on ensuring the Merit Systems Protection Board (MSPB) serves as a fair and effective forum for all parties that may appear before the Board. Given your close association with federal labor unions, how will you maintain impartiality given the likelihood that you will be called on to issue decisions or establish precedent unfavorable to your former colleagues?

My record demonstrates my ability to evaluate claims in a fair and impartial way. Prior to joining the American Federation of Government Employees (AFGE), I worked as a staff attorney with the U.S. General Services Administration defending management in labor and employment matters. While still employed at AFGE, I was appointed by the Comptroller General to a 5-year statutory term as a Member of the Personnel Appeals Board (PAB), which performs the functions of the MSPB within the Government Accountability Office (GAO) personnel system. I viewed my duty then, as I would view my duty as an MSPB Member, if confirmed, to apply the law to the facts in a neutral manner. For the last 3½ years, I have been employed as the PAB General Counsel, which involves the investigation of complaints and the representation of parties before the Board upon finding a prohibited personnel practice or other violation of rights under the GAO Personnel Act. Investigation of complaints, in particular, must be conducted in an objective and impartial manner. Along with document requests, investigations entail interviews with GAO management officials. In addition, when prosecuting complaints before the Board, I have engaged in deposing officials. As a PAB Member and General Counsel, I have carried out my duties impartially.

Members of the Merit System Protection Board must apply the law as Congress intended. I believe that a strict adherence to the law is the best way to maintain impartiality in deciding matters coming before the Board.

2. The MSPB anticipates an increase in its caseload owing to a variety of factors, including demographic shifts in the federal workforce and statutory and administrative changes in the Board's jurisdiction. In addition to moving to the simultaneous consideration of appeals by the Board, what additional methods could be useful for improving case processing time?

For FY 2009, over 70% of Board cases were decided within the prescribed 110-day timeframe. This represents a significant improvement in the Board's average case processing time. Without having the opportunity to observe the internal operations of the MSPB, it is difficult to identify what measures the Board has already taken to improve its performance with regard to timeliness of decisions and what additional methods could be useful for further improvement.



Nonetheless, I would say that one way to improve overall timeliness – and the Board may already be doing this – is to evaluate the complexity of a case at the outset and assign shorter timeframes to less complex cases. In this regard, it is important that MSPB judges have the necessary resources and training in case management techniques to produce timely, high-quality decisions in all instances. In addition, enhancing the Board's Mediation Appeals Program and increasing early resolution of cases through voluntary agreement of the parties could lead to further reductions in average case processing time. Expanding the concept of the Board's e-filing system and taking an intelligent approach to incorporating additional advances in communications systems might also result in continued improvement. At the Board level, I believe that conducting oral argument in some cases, along with the simultaneous consideration of petitions for review, could facilitate a more timely resolution of cases. These are just a few possible methods for improving case processing times. Fundamentally, I believe that the Board must continuously engage in an ongoing assessment of its processes with an eye to improving the timely issuance of decisions.

3. In Fiscal Year 2009, the MSPB required an average of 83 days to issue initial decisions. Are you satisfied with this turnaround time? If not, what would be a more desirable or appropriate timeframe? What specific initiatives will you implement to improve processing time, and how will you measure their effectiveness?

Yes, I consider an average of 83 days to issue initial decisions to be an exceptional achievement. The majority of individual employment cases that come to the Board involve serious adverse actions such as removals and demotions. In virtually all of these cases, the personnel actions have already been effectuated before an appeal is filed so that the time for processing an appeal does not delay implementation of the agency's decision. Conversely, while three months, for example, might seem like a long time to an employee who has been removed, the discovery process alone, much less the entire hearing, in comparable federal district court proceedings, often requires a minimum of ninety days to complete. Nonetheless, I believe that the Board must continuously engage in an ongoing assessment of its processes with an eye to maintaining and improving the timely issuance of decisions.

4. Do you feel that upgrading the Board's Administrative Judge positions to certified Administrative Law Judges selected through a competitive process would improve the quality of decisions issued by the MSPB?

In FY 2008, the Board's administrative judges in the regional and field offices decided 6,495 cases. See *MSPB FY 2008 Annual Report* (p. 17). Although the quality of these decisions cannot be measured solely in terms of the number of cases that are not reversed or remanded on review, this is a relevant factor in assessing judges' performance. According to the MSPB's Performance and Accountability Report for FY 2008 (p.14), the Board reversed or remanded only 6% of initial decisions in FY 2008. These statistics suggest to me that the

MSPB's administrative judges have the requisite knowledge, skills, and ability to carry out the fundamental adjudicative functions of conducting hearings and issuing sustainable, high-quality decisions. Nevertheless, if confirmed, I would be open to examining this issue further.

5. Last month, the MSPB's Office of Policy and Evaluation issued a report examining current authorities for employee discipline. According to the report's authors, front-line managers are reluctant to take appropriate disciplinary actions against poorly performing employees because they lack the training and resources necessary for tracking and evaluating employee performance. What role, if any, can the MSPB play in helping agencies address this gap?

In its report, *Addressing Poor Performers and the Law*, the Board found that the greatest problems encountered by supervisors when taking performance-based actions were "documenting performance, dealing with the subjective nature of performance, [and] creating quality standards...." *Id.* at 24. Consequently, because "much of what complicates performance-based actions is inherent in managing performance in a merit-based system," the Board also found that "it is unlikely that this situation can be improved by any statutory amendments or changes in the regulations governing performance-based actions." *Id.* It indicated that "better training and education might be helpful in addressing some aspects of the difficulty in taking performance-based actions."

The MSPB's statutory duty to conduct studies enables it to provide reliable and meaningful analysis to federal agencies with regard to a host of challenges facing personnel management. In *Addressing Poor Performers and the Law*, the MSPB offers invaluable insight as to the real – and perceived – barriers impeding an effective response to poor performers. It also makes recommendations designed to help agencies meaningfully address the actual causes behind supervisory reluctance to take performance-based actions. However, while the Board may periodically offer recommendations, the statute does not contemplate a proactive role for the MSPB in formulating specific policies or practices that federal agencies should adopt to address issues that it identifies in its studies. Moreover, such a role could conflict with its primary function as the neutral and impartial adjudicator of employment-related claims. Therefore, having clearly identified the real challenges in taking action against poor performers and made suggestions for addressing such challenges, the MSPB, in my view, played the role that Congress intended in helping agencies deal with this issue.

6. What principles will inform your review of rules and regulations issued by the Office of Personnel Management?

The Board's authority to review rules and regulations issued by the Office of Personnel Management (OPM) is expressly set forth in 5 U.S.C. §1204(a)(4) and the principles governing the exercise of that authority are stated in 5 U.S.C. §1204(f)(2). Specifically, the Board shall declare the rule or regulation (1) invalid on its face if its implementation would require any employee to commit a prohibited personnel practice as defined in 5 U.S.C. §2302(b), and (2) invalidly implemented if it has been implemented by the agency through any personnel action taken or any policy adopted such as to require any employee to commit a prohibited personnel practice as defined in 5 U.S.C. §2302(b). Beyond that, the statutory language in 5 U.S.C. §2302(b) and the Board's body of cases addressing those provisions would inform my review of OPM rules and regulations.

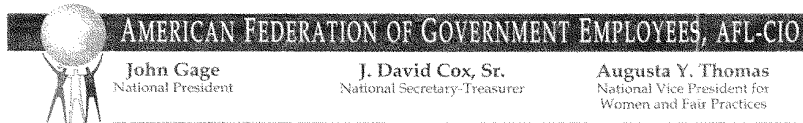
7. While it is important that federal managers abide by merit principles and statutory hiring requirements, I am also a strong supporter of providing federal agencies the tools they need to hire the best and brightest, including hiring flexibilities and performance incentives. Would you please discuss your views of how Congress and the executive branch can strike the proper balance between respecting merit principles and more effectively competing for top-flight talent?

The merit principles demand that recruitment and retention of federal employees be based on the individual's qualifications, ability, knowledge, skills and performance. In addition, they also recognize that "appropriate incentives and recognition should be provided for excellence in performance." 5 U.S.C. § 2301(b)(3). I do not perceive an inherent conflict between adherence to merit principles and the federal government's ability and need to recruit and retain top talent. Rather, merit principles help ensure that the federal government attracts and selects qualified applicants from all segments of society and hires them on the basis of relative ability after fair and open competition.

Last year, the MSPB completed a comprehensive three-part study of hiring in the federal government. *See Attracting the Next Generation: A Look at Federal Entry-Level New Hires* (Jan. 2008); *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees From Outside the Federal Government* (Feb. 2008); *Federal Appointment Authorities Cutting through the Confusion* (June 2008). The extensive data and findings set out in these reports suggest many opportunities for agencies to more effectively compete for top talent. For example, the Board found that college and public policy graduate students had certain perceptions about private versus federal sector employment – such as a belief that the private sector "offers better compensation, more challenging work and better developmental opportunities, while the nonprofit sector offers more rewarding work" – that made it difficult for the Government to recruit a qualified workforce from all segments of society. *See Attracting the Next Generation* at 31.

On the other hand, survey data indicated that both traditional (annual pay raise, leave, health insurance) and nontraditional benefits (structured training and development programs, flexible work arrangements, tuition reimbursement, telecommuting) associated with federal employment were important inducements attracting talent coming to the federal government directly from college or a university. *Id.* at 33. The Board's conclusion, that the "government has much to offer applicants that applicants want....and that [a]gencies should evaluate how and where they can maximize the use of these benefits and flexibilities and then market these job attractors to entice high-quality applicants" (*id.* at iii) is, in my view, an excellent recommendation to assist in the recruitment of top talent.

Similarly, the MSPB found that applicants for upper level positions are also attracted to the federal government by the benefits. See *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees From Outside the Federal Government* at 32. The data also indicated that agencies' use of the hiring flexibilities created under the Federal Employees Pay Comparability Act of 1990 and the Federal Workforce Flexibility Act of 2004 was a determinative factor for a majority of new hires in deciding to join the federal government. *Id.* at 34-35. New hires to these upper level positions rated their agencies as being better than their previous employer in providing challenging work and opportunities for training and development and "saw the Government as better in giving them a chance to make a difference and treating employees with respect." *Id.* at 33. I concur with the report's conclusion that the challenges facing agencies in need of top-notch upper level employees are "surmountable with carefully developed hiring strategies that capitalize on the strong attractions of Federal employment, the great variety and appeal of agencies' missions....[and] for agencies to be more creative and proactive recruiters." *Id.* at 35-36.



October 27, 2009

The Honorable Joseph Lieberman  
Chairman  
U.S. Senate Committee on Homeland Security  
and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Lieberman:

The American Federation of Government Employees, AFL-CIO, (AFGE) representing over 600,000 federal workers, strongly supports the nominations of Susan Tsui Grundmann to be Chair and Anne Wagner to be Vice Chair of the Merit Systems Protection Board (MSPB) and we urge the Homeland Security and Governmental Affairs Committee (the Committee) to favorably report their nominations. Both Grundmann and Wagner are well known to AFGE members as knowledgeable practitioners of federal personnel law and proven leaders.

Both nominees have a depth of experience in federal personnel matters that is well matched to the work of the MSPB. Susan Tsui Grundmann's experience as General Counsel for the National Federation of Federal Employees includes years of work on protecting the rights of Department of Defense workers under the recently repealed National Security Personnel System. Anne Wagner's 20 years of experience as AFGE's Assistant General Counsel and her tenure at the Personnel Appeals Board of the Government Accountability office, including serving as the Board's General Counsel, has provided her with substantial knowledge of federal personnel law and policies.

It is incredibly important that the MSPB have strong leadership to institute much needed reform. Both Grundmann and Wagner understand the rights of federal employees and are proven leaders. AFGE supports these nominees and strongly urges the Committee to favorably report their nominations.

Sincerely,

Beth Moten  
Legislative and Political Director